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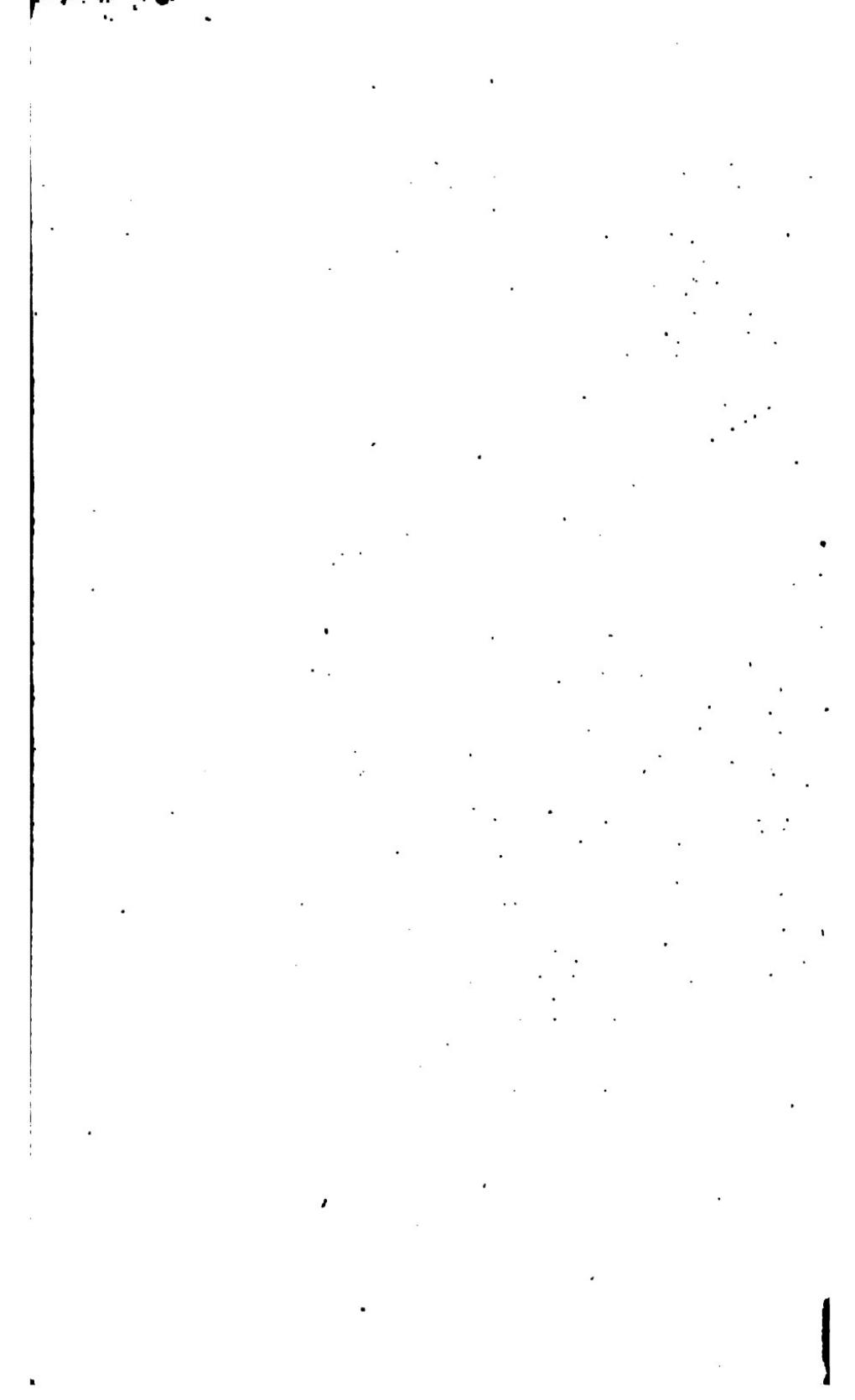
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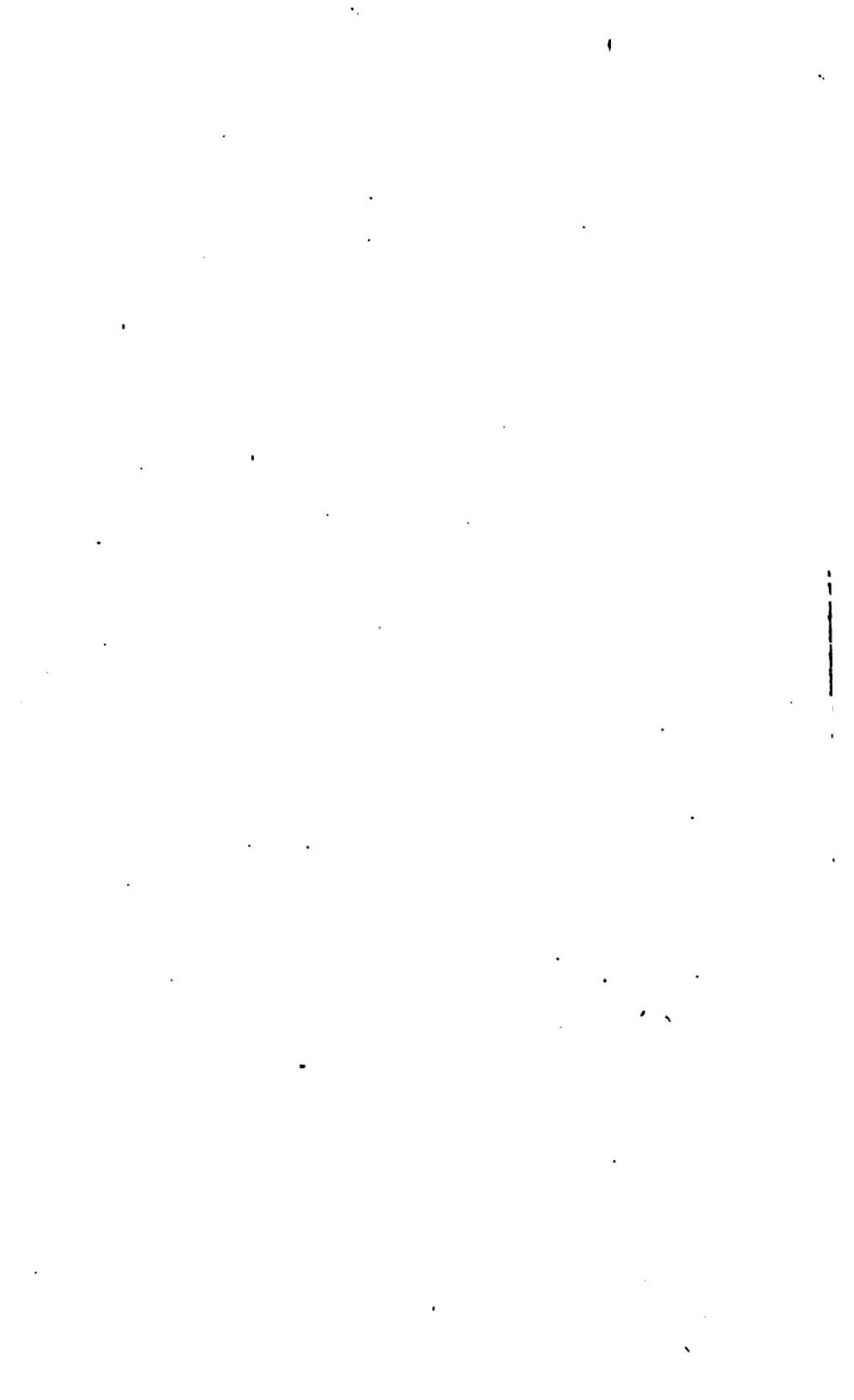
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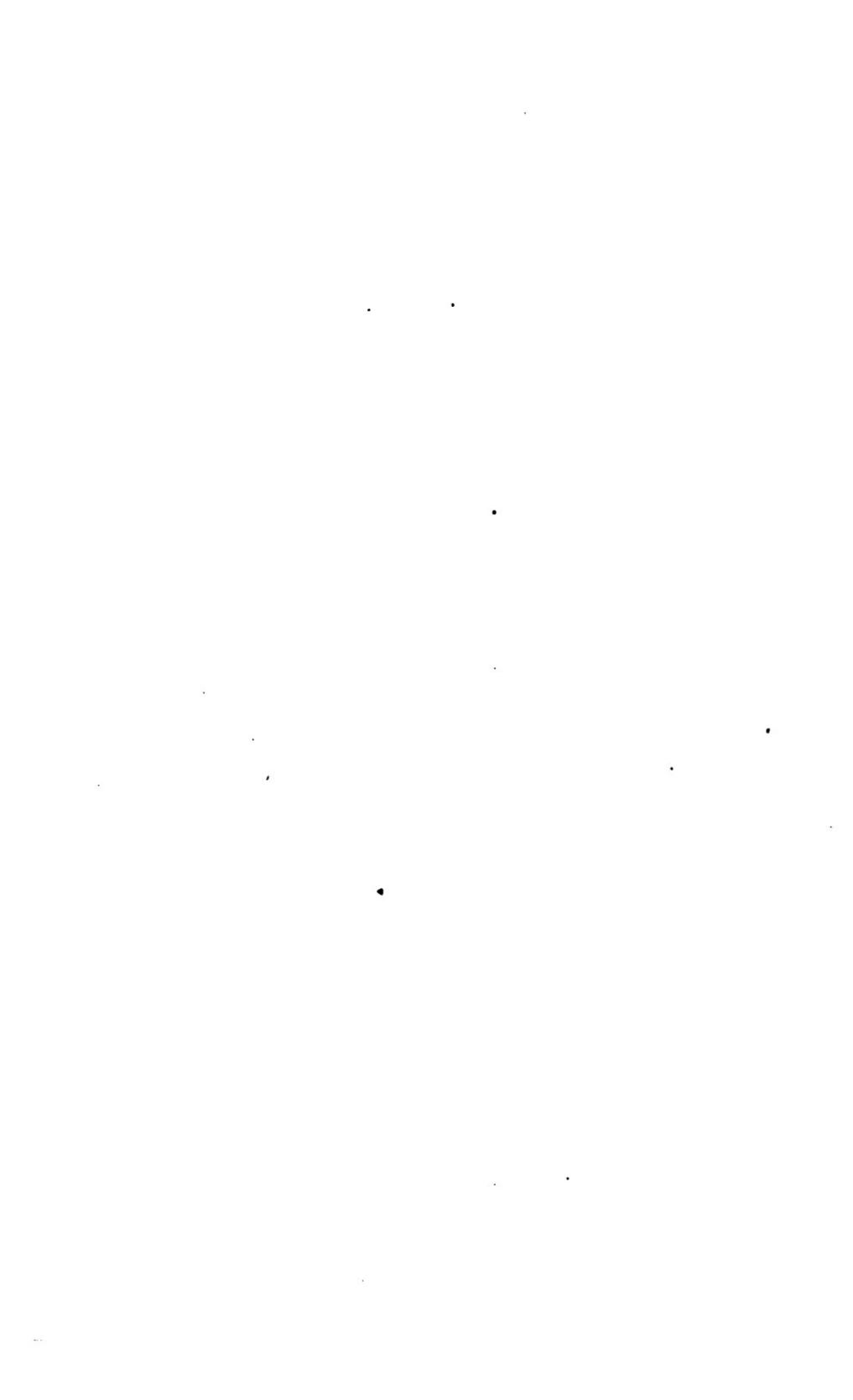
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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

STATE OF MICHIGAN.

*J*

By SAMUEL T. DOUGLASS.

SECOND EDITION, REVISED AND ANNOTATED  
BY THE REPORTER.

VOL. I.

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# T A B L E

## O F T H E C A S E S R E P O R T E D .

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<b>Atwater v. Streets</b> .....	<b>455</b>	<b>Goodwin, Parks v.</b> .....	<b>56</b>
<b>Bank of Michigan v. Nilea</b> ....	<b>401</b>	<b>Gorham, Gardner v.</b> .....	<b>507</b>
<b>Beach v. Botsford</b> .....	<b>199</b>	<b>Graves, Green v.</b> .....	<b>351</b>
<b>Beeson, Byrne v.</b> .....	<b>197</b>	<b>Green v. Graves</b> .....	<b>351</b>
<b>Bennett, Heald v.</b> .....	<b>513</b>	 	
<b>Bissell, Brown v.</b> .....	<b>273</b>	<b>Hale, Owners of Ship Milwaukee v.</b> .....	<b>306</b>
<b>Booth v. McQueen</b> .....	<b>41</b>	<b>Hammond, People v.</b> .....	<b>276</b>
<b>Bostwick v. Dodge</b> .....	<b>413</b>	<b>Hammond, Michigan State Bank v.</b> .....	<b>527</b>
<b>Botsford, Beach v.</b> .....	<b>199</b>	<b>Harlan v. People</b> .....	<b>207</b>
<b>Bowers, Thompson v.</b> .....	<b>321</b>	<b>Hasey v. White Pigeon Beet Sugar Co.</b> .....	<b>198</b>
<b>Bowne v. Johnson</b> .....	<b>185</b>	<b>Hastings, Michigan State Bank v.</b> .....	<b>225</b>
<b>Brown v. Bissell</b> .....	<b>273</b>	<b>Heald v. Bennett</b> .....	<b>513</b>
<b>Bruckner's Lessee v. Lawrence</b> , 19		<b>Holmes, Galloway v.</b> .....	<b>380</b>
<b>Byrne v. Beeson</b> .....	<b>179</b>	<b>Holmes, Clark v.</b> .....	<b>390</b>
<b>Chester, Rossiter v.</b> .....	<b>154</b>	<b>Horner v. Fellows</b> .....	<b>51</b>
<b>Clark v. Holmes</b> .....	<b>890</b>	<b>Howard v. Rockwell</b> .....	<b>815</b>
<b>Dean, Jackson v.</b> .....	<b>519</b>	 	
<b>Detroit, City of, v. Jackson</b> ....	<b>106</b>	<b>Ingersoll, Kirby v.</b> .....	<b>477</b>
<b>Detroit Young Men's Society,</b>		 	
Scott v. ....	<b>119</b>	<b>Jackson, City of Detroit v.</b> ....	<b>106</b>
<b>Dodge, Bostwick v.</b> .....	<b>413</b>	<b>Jackson v. Dean</b> .....	<b>519</b>
<b>Dousman v. O'Malley</b> .....	<b>450</b>	<b>Johnson, Bowne v.</b> .....	<b>185</b>
<b>Drake, Platt v.</b> .....	<b>296</b>	<b>Jones, Rood v.</b> .....	<b>188</b>
<b>Farmers and Mechanics' Bank</b>		<b>Jones v. Palmer</b> .....	<b>379</b>
v. Troy City Bank.....	<b>457</b>	<b>Joy v. Thompson</b> .....	<b>378</b>
<b>Fellows, Horner v.</b> .....	<b>51</b>	<b>Judges of Jackson Circuit Court,</b>	
<b>Fitch v. Newberry</b> .....	<b>1</b>	<b>People v.</b> .....	<b>802</b>
<b>Foote, Lamberton v.</b> .....	<b>102</b>	<b>Judges of Branch Circuit Court,</b>	
<b>Galloway v. Holmea</b> .....	<b>890</b>	<b>People v.</b> .....	<b>819</b>
<b>Gardner v. Gorham</b> .....	<b>507</b>		

Judges of Calhoun Circuit Court, People <i>v.</i> .....	417	People <i>v.</i> Judges of Washtenaw Circuit Court.....	434
Judges of Washtenaw Circuit Court, People <i>v.</i> .....	434	Plait <i>v.</i> Drake.....	296
Kent, People <i>v.</i> .....	42	Preston <i>v.</i> Preston.....	292
Kimmell <i>v.</i> Willard's Adm'rs..	217	Pullen, People <i>v.</i> .....	48
Kirby <i>v.</i> Ingersoll.....	477	Rice, Wheelock <i>v.</i> .....	267
Kneeland, Taylor <i>v.</i> .....	67	Rockwell, Howard <i>v.</i> .....	315
Lamberton <i>v.</i> Foote.....	103	Rood <i>v.</i> Jones.....	188
Lawrence, Bruckner's Lessee <i>v.</i>	19	Rood <i>v.</i> School District No. 7..	502
McQueen, Booth <i>v.</i> .....	41	Rossiter <i>v.</i> Chester.....	154
Michigan State Bank <i>v.</i> Hastings.....	225	School District No. 7, Rood <i>v.</i> ..	502
Michigan State Bank <i>v.</i> Hammond.....	527	Schwarz, Sears <i>v.</i> .....	504
Newberry, Fitch <i>v.</i> .....	1	Scott <i>v.</i> Detroit Young Men's Society.....	119
Niles, Bank of Michigan <i>v.</i> ....	401	Sears <i>v.</i> Schwarz ..	504
Oakland County Bank, People <i>v.</i>	282	Ship Milwaukee, Owners of, <i>v.</i> Hale.....	306
O'Malley, Dousman <i>v.</i> .....	450	Spalding, Walbridge <i>v.</i> .....	451
Palmer, Jones <i>v.</i> .....	379	Stevens <i>v.</i> Townsend.....	77
Palmer and others, Appellants,	422	Stockton <i>v.</i> Williams.....	546
Parks <i>v.</i> Goodwin.....	56	Streets, Atwater <i>v.</i> .....	455
People <i>v.</i> Kent.....	42	Taylor <i>v.</i> Kneeland .....	67
People <i>v.</i> Pullen.....	48	Thompson <i>v.</i> Bowers.....	321
People <i>v.</i> Tisdale.....	59	Thompson, Joy <i>v.</i> .....	378
People, Harlan <i>v.</i> .....	207	Tisdale, People <i>v.</i> .....	59
People <i>v.</i> Hammond.....	276	Townsend Stevens <i>v.</i> .....	77
People <i>v.</i> Oakland County Bank,	282	Troy City Bank, Farmers and Mechanics' Bank <i>v.</i> .....	457
People <i>v.</i> Judges of Jackson Circuit Court.....	302	Walbridge <i>v.</i> Spalding.....	451
People <i>v.</i> Judges of Branch Circuit Court.....	319	Warner, Wight <i>v.</i> .....	384
People <i>v.</i> Judges of Calhoun Circuit Court.....	417	Wheelock <i>v.</i> Rice.....	267
		White Pigeon Beet Sugar Co., Hasey <i>v.</i> .....	198
		Wight <i>v.</i> Warner.....	384
		Willard's Adm'rs, Kimmell <i>v.</i> ..	217
		Williams, Stockton <i>v.</i> .....	546

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
STATE OF MICHIGAN,

IN JANUARY TERM, 1843.

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PRESENT:

HON. GEORGE MORELL . . . . . CHIEF JUSTICE.  
HON. EPAPHRODITUS RANSOM,  
HON. CHARLES W. WHIPPLE,  
HON. ALPHEUS FELCH, } JUSTICES.

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Fitch & Gilbert v. Newberry & Goodell.

Plaintiffs, by their agents, shipped goods at Port Kent, on Lake Champlain, consigned to them at Marshall, Michigan, care of H. C. & Co., Detroit, by the New York and Michigan Line, who were common carriers, and with whom they had previously contracted for the transportation of the goods to Detroit, and paid the freight in advance. During their transit, and before they reached Buffalo, the goods came into the possession of carriers doing business under the name of the Merchants' Line, without the knowledge or assent of the plaintiffs, and were by them transported to Detroit, consigned by H. P. & Co., of Buffalo, to the care of the defendants, and delivered to the defendants, who were personally ignorant of the manner in which they came into the possession of the Merchants' Line, and of the contract of the plaintiffs with the New York and Michigan Line, although they and also H. P. & Co. were agents for and part owners in the Merchants' Line. The defendants being warehousemen and forwarders, received the goods and advanced the freight upon them from Troy, N. Y., to Detroit. On demand of the goods by the plaintiffs, the defendants refused to deliver them until the freight advanced by them, and their charges for receiving and storing the goods, were paid; claiming a lien upon the goods for such freight and charges. In replevin brought for the goods, *Held*,

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*Fitch & Gilbert v. Newberry & Goodell.*

that the plaintiffs were entitled to the possession of the goods without payment to the defendants of such freight and charges, and that the defendants had no lien upon the goods for the same.

A common carrier is bound to receive and carry goods, only when offered for carriage by their owner or his authorized agent, and then only upon payment for the carriage in advance, if required.

If a common carrier obtains possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value.

To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between their owner and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.

This was an action of replevin for the taking and detention of sixty-five kegs of nails, one box of goods, and one barrel of apples, tried in the Circuit Court for the county of Wayne, before GEO. MORELL, presiding judge, at the November term, 1841. The taking and detention of the property, were admitted by the pleadings. The facts in issue were found by a special verdict, which was certified to this court for its opinion upon the questions of law arising therefrom. The facts found, out of which the question decided by this court arises, are the following :

The goods and chattels described in the declaration were the property of the plaintiffs. They contracted with the New York and Michigan Line for the transportation of the nails, to be delivered to Hutchinson, Campbell & Co., Detroit, for \$1 per hundred pounds, payable in Michigan funds, and paid the freight in advance to the proprietors of the line at Detroit. The nails were shipped by the agents of the plaintiffs, at Port Kent, on Lake Champlain, July 18, 1838, by the New York and Michigan Line to Detroit, M., consigned to the plaintiffs at Marshall, M., care of Hutchinson, Campbell & Co., Detroit, and on such

Fitch & Gilbert v. Newberry & Goodell.

shipment the following bill of lading was given, signed by the master of the sloop Lafayette:

*F. & G., Marshall, Michigan.*

*Care of*

*J. Movius & Co., Ypsilanti,*

*H. Campbell & Co., Detroit.*

*New York & Michigan Line.*

*Care of*

*Eddy & Bascomb, Whitehall.*

*kegs of nails of 100 lbs. each,*

*6,500 lbs.*

*Tare*

*890*

*6,890*

*at 16 9-10 cts. per hund. delivered in* *Albany, is* *\$11.60*

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the port of Albany (the danger of the seas only excepted), unto the agents of the New York and Michigan Line, or to their assigns; freight for the said 65 kegs being paid to Albany by Messrs. Eddy & Bascomb, \$11.60.

In witness whereof, the master, as purser of the said vessel, hath affirmed to three bills of lading all of this tenor and date, one of which being accomplished, the others to stand void. Dated at Port Kent, the 18th day of July, 1838.

CHARLES P. ALLEN.

The several kegs of nails, were each marked "F. & G., Marshall, Michigan, care of Hutchinson, Campbell & Co., Detroit." Robert Hunter & Co., at Albany, and Hunter, Palmer & Co., at Buffalo, were partners in the business of transportation and forwarding between Albany, N. Y., and Detroit, M., and they, together with the

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*Fitch & Gilbert v. Newberry & Goodell.*

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defendants, who were also forwarding and commission merchants at Detroit, were the owners, and each at their respective places of business, agents of the Merchants' Line. Hunter, Palmer & Co. received the nails at Buffalo from one of the canal boats of the Merchants' Line, accompanied by a bill of lading from Robert Hunter & Co. as consignors, and advanced the freight and charges upon them from Troy to Buffalo. They then shipped them to Detroit on board a steamboat belonging to the Merchants' Line, consigning them, by another bill of lading, to the care of the defendants, who received them Aug. 11, 1838, and paid the freight and charges on them from Troy to Detroit, amounting to the sum of \$85.63. The box of goods and barrel, were shipped at a date subsequent to the shipment of the nails, from Whitesboro', N. Y., by the same line, upon the same terms, to the care of Hutchinson, Campbell & Co., marked "Fitch & Gilbert, Marshall, Michigan; care of Hutchinson, Campbell & Co., Detroit; New York and Michigan Line;" and the freight on them was also paid by the plaintiffs in advance. They were received in the warehouse of the defendants at Detroit, Oct. 26, 1838, and, as appeared by their books, they paid the freight and charges upon them to Detroit, amounting to \$3.83. The defendants had no knowledge of the contract made by the plaintiffs with the New York and Michigan Line for the transportation of the goods, or of the payment of the freight to said line, until in the fall of 1838, after their receipt by the defendants, when the plaintiffs demanded delivery of the goods, and informed them of such contract and payment. They refused to deliver the goods either to the plaintiffs or at the warehouse of Hutchinson, Campbell & Co., until the freight and charges of transportation thereon, advanced by them, amounting to \$89.46 (and exceeding the cost of transportation under the contract between the plaintiffs and the New York and

*Fitch & Gilbert v. Newberry & Goodell.*

Michigan Line), and also their charges for wharfage and storage of the goods, amounting to \$16.53, were paid claiming a lien upon the goods for such advances and charges. Whereupon, the plaintiffs sued out a writ of replevin.

*H. H. Emmons*, for the plaintiffs.

*Geo. C. Bates*, for the defendants.

**RANSOM, J.:** Upon the facts found in the special verdict, several questions were raised, but the most important, and the only one which we deem it necessary to consider, is, whether the defendants had acquired a *lien* upon the goods, which they could enforce, even against the owners, the plaintiffs in this case.

On the part of the defendants, it is contended that a common carrier who receives goods for carriage and transports them, may detain them by virtue of his *lien*, for freight, even against the owner, in case the freight has been earned without *fraud* or *collusion* on his part; that, if goods be *stolen*, or otherwise *tortiously obtained* from the legal *owner*, at New York or elsewhere, and carried by a transportation line from thence to Detroit, *without a knowledge of the theft* on the part of the carrier, he would be entitled to a *lien* for freight, even against the owner. This doctrine is sought to be maintained by the defendants' counsel, on several grounds: 1. He insists that a common carrier is bound to receive goods which are offered for transportation, and to carry them; that it is not a matter of choice whether he will receive and carry them or not; that he is liable to prosecution if he refuses. 2. That a common carrier is not only bound to receive and transport goods that are offered, but he is liable for their *loss*, in *all cases*, except by the *act of God* and public enemies; and the same rule, he insists, applies to warehousemen and

Fitch & Gilbert v. Newberry & Goodell.

forwarders. 3. That the duties and obligations of common carriers and innkeepers, are, in all respects, analogous ; and an innkeeper is bound to receive and entertain guests, and to account for a loss of their baggage while under his care. 4. That a common carrier, being bound by law to accept goods offered him for carrying, and being responsible for their safe delivery in all cases, except when prevented by the act of God or public enemies, is entitled to a *lien* for their freight, against all persons, including even the owner, when the goods were tortiously obtained from him ; that he is not bound to inquire into the title of the person who delivers them ; and such *lien* exists, although there be a special agreement for the price of carriage. 5. That the master is not bound (nor his agent for him) to deliver any part of a cargo until the freight and other charges are paid.

But for the plaintiffs it is contended : 1. That *liens* are only known or admitted in cases where the relation of *debtor* and *creditor* exists, so that a suit at law may be maintained for the debt which gives rise to the *lien* ; that a *lien* is a *mere right* to detain goods until *some charge* against the owner be satisfied. 2. That the defendants obtained possession of the goods without authority from the owners, either express or implied ; that no legal privity exists between the parties, and therefore the relation of *debtor* and *creditor* does not exist between the defendants or their principals and the plaintiff, and no action could be maintained by either against them for the freight, or any part of it. 3. They contend further, that, even if the defendants *lawfully* received the goods from the original carriers of the plaintiffs, the New York and Michigan Line, they did so as *their agents* and *servants*, and were bound by their agreement with the plaintiffs ; that their contract of affreightment is incomplete, and therefore no freight is due.

That common carriers are bound to receive goods which

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Fitch & Gilbert v. Newberry & Goodell.

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are offered by the owners or their agents for transportation, and to carry them for a just compensation, upon the routes which they navigate, or over which they convey goods in the prosecution of their business, is too well settled to require discussion, although this general proposition is subject to some qualifications.

Chancellor KENT says, 2 *Kent's Com.*, 598 : "Common carriers undertake generally, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, and with or without a special agreement as to price. They consist of inland carriers by land or water, and carriers by sea; and as they hold themselves out to the world as common carriers, for a reasonable compensation, they assume to do, and are bound to do what is required of them in the course of their employment, if they have the requisite conveniences to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action."

The books, English and American, are filled with strong cases affirming this doctrine. See 2 *Show. R.*, 882; 5 *T. R.*, 143; 4 *B. & Ald.*, 32; 1 *Pick. R.*, 50, and numerous other cases, and the elementary writers *passim*.

That common carriers are responsible for the safe conveyance and delivery of the goods committed to them for carriage, is just as conclusively settled as that they are bound to receive and carry them. A common carrier is said to be in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of God, or inevitable accident without the intervention of man, and public enemies: 2 *Kent's Com.*, 597; *Colt v. McMechen*, 6 *Johns. R.*, 160. This doctrine is sustained by a series of decisions running back through a period of more than a century and a half: *Proprietors Trent Navigation v. Wood*, 3 *Esp. R.*, 127;

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*Fitch & Gilbert v. Newberry & Goodell.*

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*Dale v. Hall*, 1 Wils., 288; *Forward v. Pittard*, 1 T. R., 33; *Hyde v. Trent Navigation Company*, 5 T. R., 389.

Another position taken by the defendants' counsel, that the duties of common carriers and innkeepers are analogous, may be admitted. As a general proposition it cannot be denied. Upon the obligations and liabilities imposed on common carriers, for the transportation, safe custody and delivery of goods, the counsel for the defendants base a corresponding right to compensation for such transportation and delivery, and a *lien* on the goods for its payment.

If, as contended for by the defendants, a carrier is bound to receive and carry all goods offered for transportation, without the right of inquiring into the title or authority of the person offering them, then clearly he should be entitled to a *lien*, even against the owner, upon the goods, until he is paid for the labor he may bestow in their carriage.

Let us now inquire whether such is the law.

The doctrine is certainly opposed to all the analogies of the law, and it seems to me to every principle of common justice.

The only adjudged case I have been able to find, which favors it, is *Yorke v. Grenaugh*, 2 Ld. Raym., 866. That was replevin for a gelding. The defendant, who was an innkeeper, received the horse from a stranger who had stolen him. On demand being made for the horse, by the owner, the defendant, who was ignorant of the theft when he received him, refused to deliver him up until paid for his keeping, insisting on his right of lien. The court held it reasonable that he should have a remedy for payment, which was by retainer; and that he was not obliged to consider who was the owner of the horse, but whether he who brought him was his guest. And HOLT, C. J., cited the case of the *Exeter carrier*, which he thus stated:

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Fitch & Gilbert v. Newberry & Goodell.

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Where A. stole goods, and delivered them to the *Exeter* carrier to be carried to *Exeter*, the owner finding the goods in the possession of the carrier, demanded them of him. The carrier refused to deliver them, without being first paid for the carriage. The owner brought trover for his goods, and it was adjudged that the defendant might detain them for the carriage, on the ground that the carrier was obliged to receive and carry them. POWELL, J., denied the authority of the *Exeter* case, but concurred with C. J. HOLT in the decision of the case then under consideration. There is an obvious ground of distinction between the cases of *carrying goods* by a common carrier, and the furnishing *keeping* for a horse by an innkeeper. In the latter case, it is equally for the *benefit* of the owner to have his horse fed by the innkeeper, in whose custody he is placed, whether left by a thief, or by himself or agent; in either case, food is necessary for the preservation of his horse, and the innkeeper confers a benefit upon the owner by feeding him. But can it be said that a carrier confers a benefit on the owner of goods by carrying them to a place where, perhaps, he never designed, and does not wish them to go? Or, as in this case, is the owner of goods benefited by having them taken and transported by *one* transportation line, at their own price, when he had already hired and paid *another* to carry them at a *less* price? This distinction does not, however, at all affect the determination of the case before us; we place it entirely upon other grounds.

The case of *Brown v. Walters*, 14 *E. C. L. R.*, 424, was cited to show that a carrier was not bound to inquire into the title of a person offering goods for carriage. In that case the plaintiff bought two horses of defendant, which had been previously placed in the possession of one Boost, a livery stable keeper, for *feeding* and *training*. When the plaintiff, after the purchase, applied to Boost for the horses,

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Fitch & Gilbert v. Newberry & Goodall.

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he refused to deliver them till paid for keeping and training, which the plaintiff paid, amounting to £130, and then brought assumpsit against the defendant for the money. He was allowed to recover on the ground that Boost had a valid lien upon the horses, and that the sale by defendant to the plaintiff created such a privity between them, as authorized the plaintiff to discharge the lien and resort to the defendant for repayment.

The decision of that case, it is seen, does not rest at all upon the ground contended for here by the defendants.

Several elementary authorities are also cited by defendants' counsel, in support of the doctrine assumed, but they are found, in every instance, to refer to the case of *Yorke v. Grenaugh*, 2 *Ld. Raym.*, and of course do not go far to fortify the position taken in this case; but leave it still resting upon the authority of that decision alone.

All the other cases, in which the general proposition is laid down that common carriers are bound to receive goods offered for carriage, are evidently based upon the supposition that the goods are there offered by their owners or their authorized agents; and that, if in any way they acquire possession of property without consent of the owner, express or implied, they, like all other persons, may be compelled to restore it to such owner, or pay him for its value. And that the doctrine of *caveat emptor* applies, with the same force, to that class of persons as to others, is manifest, I think, from an examination of authorities.

The obligation of a common carrier to receive and carry all goods offered, is qualified by several conditions, which he has a right to insist upon before receiving them.

1. That the person offering the goods has authority to do so.
2. That a just compensation, or the usual price, be tendered for the carriage.
3. That, although the *owner*, or his agent, offers goods for carriage and tenders payment for the freight in advance, still he is not bound to

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Fitch & Gilbert v. Newberry & Goodell.

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receive them, unless he have the requisite convenience to carry them.

In an action brought against a carrier for refusing to receive and carry *goods*, would it not constitute a valid defense that the plaintiff had stolen them, although, at the time of offering, the carrier may not have known they had been stolen?

In *Story on Bail.*, § 582, it is laid down that a carrier is excused for *non-delivery* of goods to the consignee, when they are demanded, or taken from his possession, by some person having a superior title to the property. And, again, where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded and he resists it, he is liable to an action for the recovery of the goods.

If, then, the owner could reclaim the goods in the hands of the carrier, *after* their delivery to him, and that would excuse a *non-delivery* to the depositor, it is clear that he would be justified in refusing to *receive* them from one having a wrongful possession, although at the time of such refusal, he might not know the manner in which they had been obtained.

So, a carrier is in all cases entitled to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them: *Story on Bail.*, § 586; 5 *Barn. & Ald.*, 353; 4 *Id.*, 32; 3 *Bos. & Pull.*, 48; and *Whit. on Liens*, 92.

If, then, a common carrier may demand payment for carriage in advance, and if he may reject goods offered by a wrong-doer, or by one having no authority to do so, is he not bound to take care that the person from whom he receives them has authority to place them in his custody?

In *Story on Bail.*, § 585, it is said: "A carrier having

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Fitch & Gilbert v. Newberry & Goodell

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once acquired the *lawful possession* of goods for the purpose of carriage, is not bound to restore them to the owner *again*, unless his due remuneration be paid; evidently presupposing the goods to have been delivered to him by the owner," and cites 9 *Johns.*, 17; 3 *Johns. Cases*, 9. In *Lemprier v. Pasley*, 2 *T. R.*, 485, it was held that goods wrongfully delivered to the person claiming them, who paid freight and other charges, could not be detained for those expenses against the rightful owner. In 2 *Kent's Com.*, 638, it is laid down, that possession is necessary to create the lien, but though there be possession of goods, a lien cannot be acquired when the party came to that possession wrongfully. So, if the party came to the possession of goods *without due authority*, he cannot set up a *lien* against the owner: 2 *Kent's Com.*, 638; 5 *T. R.*, 604; 4 *Esp. R.*, 174; 7 *East.*, 5. In *Buskirk v. Purington*, 2 *Hall R.*, 561, property was sold upon a condition; the buyer failed to comply with the condition, but shipped the goods on board the vessel of the defendants. The owner claimed the goods, demanded them, and on defendants' refusal to deliver them, brought trover for their value. The defendants insisted on their right of lien for the freight, but the plaintiff was allowed to recover.

In *Salters v. Everett*, 20 *Wend.*, 275, the master of a vessel, with whom the defendant in error shipped goods from New Orleans to New York, during the voyage made a new bill of lading in his own name as owner. The goods at New York were sold to the plaintiff in error, who was ignorant of the shipmaster's fraud. The owner (the defendant in error) sued the purchaser for their value, or return. Senator VERPLANCK, in the opinion which he delivered in the Court of Errors, held this doctrine: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and, consequently, that

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*Fitch & Gilbert v. Newberry & Goodell.*

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even the honest purchaser, under a defective title, cannot hold against the true proprietor." And again, "there is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the *real owner* could be concluded by a bill of lading not given by himself, but by some third person, *erroneously or fraudulently.*" *Id.*, 281. "If the owner lose his property, or is robbed of it, or it is sold, or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise; or by a *qualified possession* of it, for a specific purpose, as for transportation, or for work to be performed upon it, the owner can follow and reclaim it in the hands of any person, however innocent:" *Id.*, 282.

In *The Anne*, 1 *Mason C. C. R.*, 512, persons not authorized by the owner took command of a vessel and carried her out of the regular course of the voyage, and employed a pilot to take her into port, and he sought to enforce his lien on the vessel for pilotage. In deciding that case, the court say: "It cannot be maintained, upon any acknowledged principles of law, that mere wrong-doers, or usurpers of the command of the ship, not acknowledged or appointed by the owner, can create a lien on the ship, or personally bind the owner, by a contract which they may choose to make, whether it be beneficial to him or not."

In *Greenway v. Fisher*, 1 *C. & P.*, 190 (11 *E. C. L. R.*, 362), it was said, that if goods be placed in the hands of a common carrier, without the consent of the owner, and while he has them in possession, they be demanded and he refuse to deliver them, trover lies at the suit of the owner. In *Hoffman v. Carrow*, 22 *Wend.*, 318, the court say: "The doctrine of our decision is, that the original and true owner of movable property, who has not, by his own act or assent, given a color of title or an apparent right of sale to another, may recover its value from any

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*Fitch & Gilbert v. Newberry & Goodell.*

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one having it in possession, and refusing to deliver it up to him."

If it be said for the defendants, that Allen, the master of the vessel on which the goods were originally shipped, or Eddy & Bascomb, the wharfingers and forwarders to whose care at Whitehall they were consigned, delivered them to the defendants or to those from whom they received them, it may be replied that if such were the fact, it would not affect the rights of the plaintiffs, or the liabilities of the defendants, under the facts found by the special verdict in this case.

The jury have found that the plaintiffs contracted with the New York and Michigan line, to transport their goods to Detroit, and paid them the stipulated price for the carriage, in advance. The only power over the goods which that line derived from their contract with the plaintiffs, was, to safely carry and deliver them at the place of consignment. They had no authority to transfer them to any other line, and make the plaintiffs chargeable for the freight. And the defendants, under such a transfer, could acquire no right to compensation for freight, as against the plaintiffs.

Nor had Eddy & Bascomb, from any fact appearing in the case, any authority to forward the goods, from Whitehall, by any conveyance other than that which the plaintiffs had directed, and which appeared upon the bill of lading that accompanied the goods. A special authority must be strictly pursued; and whoever deals with an agent, constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power: 2 *Kent's Com.*, 631. No one can transfer to another a better title than he has himself, or a greater interest in personal property, than he, or the person for whom he acts, possesses: *Hoffman v. Carrow*, before cited.

To create a *lien* it is necessary that the party vesting it,

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*Fitch & Gilbert v. Newberry & Goodell.*

should have the power to do so. A person can neither acquire a lien by his own wrongful act, nor can he retain one, when he obtains possession of goods without the consent of the owner, express or implied: 5 *T. R.*, 606; 1 *Saud. Pl. & Ev.*, 326; 2 *Stark. Ev.*, 360; *Andrew v. Dietrich*, 14 *Wend.*, 31.

It is quite clear that from no delivery made of the goods in question, by the original carriers, to the Merchants' Line, can any contract be implied that the plaintiffs would pay them for the freight, and thus lay the foundation for the lien claimed.

But if it be admitted that the owners or agents of the New York and Michigan Line, delivered the plaintiffs' goods to the defendants, or to those for whom they acted, they must be presumed to have received them as the agents of that line, and to have transported them from Albany to Detroit, for and on account of that line; and they, consequently, can resort to it alone for compensation. If the defendants are the agents of the New York and Michigan Line, they are bound by the contract of affreightment which that line made, and to entitle them to freight (had it not been paid in advance) they should show that contract strictly and fully performed, by a delivery of the goods to the consignees named in the contract. It is not sufficient that the goods arrive at the port of destination, but there must be a delivery of them to perfect the right to freight: *Ab. on Sh.*, 273. It is a general and an acknowledged rule, that the voyage must be performed according to the contract, before the ship owner or master can demand his freight. Conveyance and delivery of the cargo are conditions precedent, and must be fulfilled. A partial performance is not sufficient, unless delivery be dispensed with, or prevented by the owner. *Palmer v. Lorrillard*, 16 *Johns. R.*, 356.

If the goods came to the hands of the defendants or

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*Fitch & Gilbert v. Newberry & Goodell.*

their principals, *without* the agency of those who control the New York and Michigan Line, *with* or *without* fraud, as by finding them in a storehouse, or on a wharf at Whitehall, Albany, Buffalo or elsewhere, it would not vary the case.

If goods came to the possession of a person by finding, and he has been at trouble and expense about them, he has a *lien* upon the goods for compensation, *in one case only*, and that is the case of goods lost at sea; *then* there is a lien for salvage. This lien is allowed upon principles of commercial necessity, and is thought to stand upon peculiar grounds of maritime policy, and does not apply to cases of finding upon land: 2 *Mason R.*, 88; 2 *Kent's Com.*, 685, and numerous cases there cited.

But it is insisted by the plaintiffs that a *lien* can *only* be created when the relation of *debtor* and *creditor* exists between the parties.

A *lien* is defined to be a *tie, hold* or *security* upon goods or other things, which a man has in his custody, till he is *paid what is due him*: 2 *Pet. Dig.*, 692.

In the case of the *United States v. Barney*, it was held that a *lien* cannot exist against the government; for liens are only known or admitted, in cases where the relation of *debtor* and *creditor* exists, so as to maintain a suit at law for the debt or duty which gives rise to the lien, in case the pledge be destroyed, or the possession lost. An innkeeper cannot, therefore, upon the ground of a *lien*, justify the arrest and detention of the horses employed in the transportation of the public mails: 2 *Pet. Dig.*, 693; 2 *Hall's Law Jour.*, 128. In *Oppenheim v. Russell*, 3 *B. & P.*, 49, Justice HEATH says: "There is a certain privity of contract, between the consignor of goods and the carrier, and it is evident that there is this privity of contract from this consideration, that if the consignee cannot be found, or refuse to receive the goods, the carrier may come upon

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Fitch & Gilbert v. Newberry & Goodell.

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the consignor for the carriage of the goods, which he could not do, unless there was a privity of contract between them." Is not the principle decided in these cases perfectly conclusive of the rights of the parties to this suit? It seems to me to be a proposition too plain to be controverted. That one man cannot, *by his own act*, make another his debtor, *without his consent*, will not be questioned. Consequently, it is not sufficient to create the relation of debtor and creditor, that the plaintiff should have rendered services to the defendant, without also showing that the defendant assented to the services, and expressly or impliedly agreed to remunerate the plaintiff for them. *Bartholomew v. Jackson*, 20 Johns., 28, is a strong case upon this point. The action was assumpsit, for removing a stack of wheat, without the knowledge of the defendant, to prevent its being burned. The court, in their decision of the case, adopt this language: "The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise, express or implied." *Everts v. Adams*, 12 Johns., 352, where the plaintiff furnished medicines for a town pauper, and sought to charge the overseers of the poor, and *Dunbar v. Williams*, 10 Johns., 249, where the plaintiff provided medicines to defendant's slave, without the knowledge of the owner, and numerous kindred cases, are to the same effect.

*Schmaling v. Thomlinson*, 6 *Taunt.*, 147 (1 *E. C. L. R.*, 336), bears directly upon the question involved in this case. The action was for commission, work and labor, and money paid for shipping and forwarding the goods of the defendants from London to Amsterdam. The defendants employed Aldibert, Becker & Co. to perform the business, and they employed the plaintiffs, who had no communication with, or knowledge of the defendants. The plaintiffs forwarded the goods as directed. The court decided there was no privity between the plaintiffs and defendants;

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*Fitch & Gilbert v. Newberry & Goodell.*

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that the defendants looked to Aldibert, Becker & Co. for the performance of their business, and Aldibert, Becker & Co., and they only, had a right to look to the defendants for payment. There the forwarder delivered the goods and sued for the carriage, etc. Here the defendants *refused* to deliver the goods, and insisted on their right to a *lien*. The principle involved, however, is the same in both cases, if it be admitted that there must be a *debt* to sustain a *lien*.

Finally, on a full and careful consideration of this case, we arrive at the following conclusions:

1. That a common carrier is bound to receive and carry goods, only when offered for carriage by their owner or his authorized agent, and *then* only upon payment for the carriage in advance, if required.

2. If a common carrier obtains the possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value.

3. To justify a *lien* upon goods for their freight, the relation of debtor and creditor must exist between the owner and the carrier, so that an action at law might be maintained for the payment of the debt, sought to be enforced by the *lien*.

The facts set forth in the special verdict found in this case do not bring it within the principles which justify the *lien* claimed by the defendants, and, therefore, judgment for the plaintiffs must be entered upon the verdict, for their damages for the detention of the goods replevied, and for their costs.

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Bruckner's Lessee v. Lawrence.

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**Christopher Bruckner's Lessee v. Wolcott Lawrence.**

Where a boundary of land, conveyed by patent from the United States, is described by course and distance, terminating at a post, and neither any marks indicating such boundary, nor any post indicating its termination, are to be found on the land, and no evidence is adduced, showing where such post was originally placed; parol evidence, that a line was found marked upon the trees upon the land, but variant from the call of the patent, and not indicated by the monument called for in the patent, was the actual line surveyed, run, and marked, as such boundary, by the government surveyor, will not be admitted, to alter or vary the boundary, as described by course and distance in the patent. (a)

In the construction of grants, both course and distance, must give way to natural or artificial monuments or objects; and courses must be varied, and distances lengthened or shortened, so as to conform to the natural or ascertained objects, or bounds called for in the grant; but where there is nothing in the conveyance to control the call for course and distance, the land must be run according to the course and distance given in the description of the premises. (b)

A patent of land from the United States, cannot be impeached in *an action at law* on the ground either of *fraud or mistake*, in any of the proceedings required as prerequisites to its issuing, by one claiming under a subsequent grant.

A grant of land (except as a release) is inoperative and void, if, at the time of the grant, the lands are in the actual possession of another person, claiming under a title adverse to that of the grantor. (c)

Ejectment tried at the Circuit Court for the county of Monroe, at the December term, 1840, before the Hon. Wm. A. Fletcher, Presiding Judge, who reserved certain questions arising at the trial, and certified them to this court for its opinion thereon. The questions reserved appear in the opinion of the court.

*I. P. Christiany, H. T. Backus and Wm. Woodbridge,*  
for plaintiff.

*A. D. Fraser and R. McClelland,* for defendant.

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(a, b) *Moore v. People*, 2 Doug., 490, to same effect. See also *Britton v. Ferry*, 14 Mich., 58.

(c) Followed by the chancellor, as to the legal title, in *Godfroy v. Disbrow*, Walk Ch. R., 200; eviscerated in *Stockton v. Williams*, *post*, 547; abolished by § 7, p. 263, of R. S. 1846, which has remained in force ever since; reaffirmed as to conveyance prior to the statute in *Hubbard v. Smith*, 2 Mich., 207; reversed in *Crane v. Reeder*, 21 Mich., 25, 82.

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*Bruckner's Lessee v. Lawrence*

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**RANSOM, J.:** This is an action of ejectment brought by the plaintiff to recover the possession of a certain tract of land, described in the declaration.

On the trial of the cause at the circuit, the plaintiff gave in evidence a patent from the president of the United States, to Geo. McDougal and Israel Ruland, dated July 24, 1811, executed under an act of congress, entitled "An act regulating the grant of land in the territory of Michigan," approved March 31, 1807, under which he claimed the lands in question.

The patentees, a few days subsequently to the date of the patent, conveyed the land to Gov. Hull. In 1815 Gov. Hull conveyed to Elkanah Watson, and May 7, 1835, Watson conveyed to the plaintiff. The patent describes the land as bounded on the east by a tract confirmed to Rachael Knaggs; on the south by the river Raisin, and on the west and north by unconceded lands of the United States, and more particularly as follows, that is to say: Beginning at a post on the north border of the river Raisin, at the southwest corner of the tract confirmed to Rachael Knaggs, and running on the margin of the river, up stream, 81 degrees west, 9 chains and 65 links; thence along the side margin, up stream, north, 64 degrees west, 11 chains to a post; thence north, 19 degrees east, 299 chains and 92 links, to a post; thence south, 71 degrees east, 20 chains and 42 links, to a post, the northwest corner of the tract confirmed to Rachael Knaggs; and thence south, 19 degrees west, 299 chains and 58 links, to the place of beginning; containing 613 and 64-100 acres. The tract is also designated as No. 428.

The west line of the Rachael Knaggs' tract was not disputed, and it was proved that, running the lines and courses, described in the patent for tract No. 428, on the ground lying west of it as claimed by the plaintiff, no

*Bruckner's Lessee v. Lawrence.*

posts mentioned in the patent, and no monuments indicating a line could be found; and there was no evidence to show the points where the posts had been placed, or that they ever had been placed agreeably to the patent.

A plat was then offered in evidence, by the plaintiff, purporting to be a true copy of that part of Greeley's connected map of private claims on the river Raisin, which delineates the surveys adjoining claim No. 428, and also a map purporting to be a copy of the recorded plat in the office of the surveyor-general, at Cincinnati, of the public surveys (made by Joseph Fletcher), in township No. 6 south, range 7 east, showing the connection with the westerly line of claim No. 428. These maps, with the testimony substantiating them, were objected to by the defendant, but admitted by the court.

The plaintiff further offered in evidence, as proof of the original field notes of the survey made by Aaron Greeley, who, as deputy surveyor-general, surveyed the private land claims on the river Raisin, a paper writing, in reference to which it was proved by the surveyor-general and the chief clerk in his office, that they were unable to state whether the original field notes of the survey of private land claims in the, now, state of Michigan, which were made prior to the year 1815, were ever returned to the office of the surveyor-general; that the surveys were made by Aaron Greeley, and that the field notes now on file in said office, appear to be transcripts from the original notes, made and signed by him. Copies of similar transcripts of the surveys of several tracts of land granted for private claims, on the river Raisin, and near the premises in question, were offered in evidence by the plaintiff, all which were objected to by the defendant, but admitted by the court.

It was further shown by the surveyor-general and his chief clerk, that the only returns to said office relative to

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Bruckner's Lessee v. Lawrence.

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said claims, or the survey thereof, where the transcripts of the field notes aforesaid, and the connected map before mentioned, of surveys of private land claims, describing them as made by Aaron Greeley.

It was then proved by the defendant, that Aaron Greeley surveyed the private land claims on the River Raisin, confirmed under the act of congress of March 3, 1807, and that those surveys were all made in the summer of 1810; that an examination of the lines of the Rachael Knaggs' tract, and of some other lots surveyed by Greeley, had been made, and that Greeley's lines were marked upon the trees; that upon examination of such marks they were found to have been made in 1810; that there was found a full and distinct line of that age parallel with the Rachael Knaggs' tract, at the distance of 9 chains and 37 links west of it, being, according to defendant's claim, the east line of his land, and the west line of lot No. 428; that there was a corner tree (marked for a corner) at the northern extremity of the last mentioned line; that a similar line was found running east from this corner tree, to the northwest corner of the Rachael Knaggs' lot, and continuing thence eastwardly, forming the northern boundary of her lot. By cutting into the mark on the corner tree before named, there were found the figures 428, marked with an iron, and made at the time of the original marking.

It was proved, by a witness who assisted Greeley in the original survey of the claims, that said line was actually run and marked by Greeley, as the west line of lot No. 428; that this was the last line run by him; that Greeley's uniform custom was, to mark his lines, in said surveys, upon the trees; that he never designated such lines or corners by driving stakes; and that he marked the corner trees with an iron.

An examination was made with a view to find a west

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Bruckner's Lessee v. Lawrence.

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line for No. 428, as claimed by the plaintiff, at a distance of 20 chains and 42 links from Rachael Knaggs' west line. It appeared that the greatest part of the distance was timbered land, and of a growth sufficiently large to have received marks in 1810; but such line could nowhere be found; and that the line upon the north did not extend further west than to the corner tree before mentioned, marked 428.

It was shown, by copies of papers on file in the land office at Detroit, that, in the application of McDougall and Ruland, to the land commissioners, for allowance of their claim, No. 428, only 560 acres were claimed, whereas their patent covers 613 and 64-100 acres.

It appeared from the same source, that the certificate of confirmation of lot No. 428, was signed by only *one* of the *three* commissioners, then in office, and acting under the act of congress before referred to. And James Abbott, one of said commissioners, testified that such certificates were generally signed by at least *two* of the board; he knew of no instance where it had been otherwise.

The defendant further proved, that the unceded lands belonging to the United States, and upon which lot No. 428 was bounded on the west, were, in 1819, surveyed by Joseph Fletcher, a deputy of the surveyor-general of the district; that such survey extended east, over the west line called for by the patent for tract No. 428, a little more than one half the width of said tract; that the east line of the survey made by Fletcher was run at the distance of 9 chains and 87 links west of the tract confirmed to Rachael Knaggs, and about three or four rods east of the line run by Greeley, in the summer of 1810, as the west boundary of lot No. 428, near the river Raisin; and that the two lines, in running back from the river, converged, so as to meet at a point about half way

Brackner's Lessee v. Lawrence.

from the river to the rear of lot No. 428; from thence to the rear, they coincided.

The defendant purchased of the United States, several lots of land, extending from the river Rasin to the rear of lot 428; all of which lots overlapped the west boundary of No. 428, according to the patent granted to McDougall and Ruland; extending to the east line of the survey made by Fletcher. Of these lots, the defendant had obtained patents from the president of the United States as early as the year 1824, and, at the date of the deed from Elkanah Watson to the plaintiff, and long prior thereto, was, and ever since had continued to be, in the actual, open and peaceable possession of those lots; holding and claiming adversely to Watson and all others, by virtue of his said title and possession. He had built mills and made other valuable improvements thereon. It was further proved that Watson never was in possession of any part of the premises.

The Circuit Court charged the jury, that the evidence given by the defendant, respecting the line, actually run by Greeley, as stated by witnesses, for the west line of lot No. 428, could not control the courses and distances mentioned in the patent; that inasmuch as the patent, and the original survey, designated the land by courses and distances, and called for *posts*, as monuments at the angles of the lots, the defendant, if he claimed a line different from that designated by such courses and distances, was bound to show the posts referred to in the survey and patent, or if they could not now be found, he must prove where they were actually placed; that proof, by oral testimony, that a line found marked upon the trees, was the actual line surveyed, run and marked, as the west line of said lot, by the government surveyor, could not avail. That the returns and field notes given in evidence were conclusive, and (in the absence of the monu-

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Bruckner's Lessee v. Lawrence.

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ments called for in the patent) the only guide to be resorted to, and whether an actual location, or survey, had been made or not, the field notes and return could not be controverted by parol evidence; that these papers, if the jury believed the evidence, they were to take as the true and only returns, made by Greeley in the case, to the office of the surveyor-general; that if the patent had referred to a marked line, the defendant might have shown it to be in a different place from that indicated by the courses and distances; but that no proof of different kinds of monuments, indicating said line, could be given, and that proof of the line marked, was not evidence of the location of the monuments called for in the patent and field notes; that there being evidence in the case that the posts called for in the patent could not be found, and no evidence showing where they were actually stuck, the plaintiff was entitled to have the tract run out according to the courses and distances mentioned in the patent and survey of Greeley, and was, therefore, entitled to the whole tract of land described therein.

The court also charged the jury, that it was immaterial whether the certificate of confirmation, under which the survey was made, was signed by a majority of the board of commissioners or not, and that the jury could not inquire whether the certificate and survey under it, were, or were not, in accordance with the confirmation; that neither fraud nor mistake in any proceeding anterior to the issuing of the patent, could be inquired into, or could affect the results of this trial; and that if the commissioners originally confirmed the patentees in a *three* acre tract only, and the survey was actually made and the lines marked in accordance with such confirmation, and after the survey, the patentee had obtained, by fraud or otherwise, the certificate of *one* of the commissioners only, to such allowance, to be a *seven* acre tract, and said surveyor

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Bruckner's Lessee v. Lawrence.

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had made a paper return in accordance therewith, without going upon the land or making an actual survey thereof, and the patent had issued for such *seven acre* tract, still the patentee would, by law, be entitled to the whole tract described in his patent (if the same could be located on the ground), to be held according to the description in the patent.

And the court further instructed the jury, that if they found that the defendant, on the seventh day of May, 1835, the date of Watson's deed, under which the plaintiff claims title, held *any portion* of the land claimed by the plaintiff, by open and adverse possession, they would find for the defendant for *such portion*; on the ground that the deed from Watson, to the plaintiff, for so much of the land as was thus held by defendant, was inoperative and void.

Upon the evidence submitted, and the charge of the court, the jury found a verdict for the plaintiff for so much of the land claimed by him, as was not shown to have been held adversely by the defendant at the date of Watson's deed, May 7, 1835.

This case presents four several questions for our consideration :

1. Whether the plats and maps, found in the office of the surveyor-general, at Cincinnati, were competent evidence, and properly admitted by the court, on the trial.

2. Whether the lines and monuments found on the ground, but not corresponding with the calls of the patent, are to control the courses and distances given in the patent.

3. Whether the patent, issued to the plaintiff, can be impeached, for fraud or mistake, in any of the proceedings anterior to the issuing of the patent, in an action at law, by one claiming under a subsequent grant; or whether it is conclusive evidence of the regularity of every step prior to its date; and,

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Bruckner's Lessee v. Lawrence.

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4. Whether a deed, executed while a third person is in possession, holding the premises adversely to the grantor, is inoperative and void.

1. From the view we take of the three last questions presented by this case, it is unnecessary to consider the first; we, therefore, declare no opinion upon the competency of the evidence offered by the plaintiff, and, although objected to by the defendant, admitted by the court.

2. Whether the actual lines and monuments found on the ground, are to control the courses and distances called for in the patent.

The question is, in general terms, whether parol evidence was admissible in this case, to explain the patent under which the plaintiff claimed title; whether the extent of the grant shall be determined by the courses and distances given in the patent, or by the marked line, corner tree, etc., proved by the witnesses, but not called for in the patent. The general principle, that deeds and other instruments in writing cannot be contradicted, varied or explained by parol evidence, is established by numerous decisions, and cannot now be denied. We have only to inquire, therefore, whether the patent in this case is one admitting of explanation on the ground of mistake, or for any other reason. It would seem that, unless there be some latent ambiguity in the language of the instrument, in relation to the description of the lands granted, no parol proof is necessary or proper.

Where is the ambiguity in the patent in question?

A latent ambiguity arises from circumstances, *dehors* the instrument, but there are no such circumstances creating doubt or ambiguity in this case. The granted premises are described in the patent, first by general boundaries; those boundaries are found precisely according to the call. They are more particularly described by giving the boundaries on two sides, posts at the corners or angles,

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Bruckner's Lessee v. Lawrence.

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and courses and distances on every side. No posts are found, nor is there any proof, in the case certified, that any were, in fact, ever placed on the ground; on the contrary, the witness stated that Greeley, by whom the grant was surveyed, never drove stakes, but always marked standing trees for the corners. The proposition was not, then, to prove to the jury that there was a disagreement between the courses and distances, and the monuments and boundaries, as given in the patent, and as they are found on the land, but to show that there was an actual line on the ground, not described or called for in the patent, but, in fact, intended by the surveyor, Greeley, as one of the boundaries of the plaintiff's grant. To admit parol proof of a marked line, nowhere mentioned in the deed, but entirely variant from its calls, would serve to render titles to real estate dependent, not on deeds of conveyance, and the language of the grantor, and courses, distances and monuments, but on the mere memory of witnesses: 5 *Greenl. R.*, 502 (decided in 1829).

In 5 *Greenl. R.*, 503, the court say: "It has often been decided by other courts, as well as this, that where there are no monuments referred to in a deed of conveyance, or if they are gone, and the place where they originally stood cannot be ascertained, the courses and distances mentioned in the deed, must govern the parties and those claiming under them; for in such case there can exist no latent ambiguity, because no extrinsic facts or circumstances exist to create it."

In deciding the case of *Chinoweth et al. v. Lessee of Haskell et al.*, 3 *Pet. R.*, 96 (decided in 1830), Chief Justice MARSHALL used this language: "It is an obvious principle, that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself. For the purpose of furnishing this description, and of separating the land

*Bruckner's Lessee v. Lawrence.*

from that which is not appropriated, a survey is made." "The description of the land thus made by a survey is transferred into the grant. It consists of the courses and distances run by the surveyor, and of the marked trees at the lines and corners, or other natural objects which ascertain the very land which was actually surveyed. The courses and distances are less certain and permanent guides to the land actually surveyed and granted, than natural and fixed objects on the ground; but they are guides to some extent, and, in the absence of all others, must govern us. If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us, and must be used."

*McIvers' Lessee v. Walker et al.*, 4 Wheat., 444 (4 Pet. Cond., 502), decided in 1819, asserts the same principle. The court say: "If nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian. But it is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently, if marked trees and marked courses be found, conformably to the calls of the patent, or if water courses, or mountains, or any other natural objects, be called for in the patent, distances must be lengthened or shortened, and courses varied so as to conform to those objects."

*Boardman et al. v. Lessees of Reed et al.*, 6 Pet. R., 845 (decided in 1832); *Wendell v. The People*, 8 Wend. R., 190 (decided in 1831); *Jackson ex dem. Putnam et al. v. Bowen*, 1 Caine's R., 358; 7 Mass. R., 496; 8 Id., 146; 4 Greenl., 496, distinctly affirm the principle of the cases previously

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Bruckner's Lessee v. Lawrence.

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above cited. I take it then to be a settled rule, in the construction of grants, that both course and distance must give way to natural or artificial monuments or objects; and courses must be varied and distances lengthened or shortened, so as to conform to the natural or ascertained objects or bounds called for in the grant; but where there is nothing in the conveyance to control the call for course and distance, the land must be run according to the course and distance given in the description of the premises. In *Wendell v. The People*, the chancellor reviews all the cases upon this question, and declares the law to be as above stated. The only case I have found which militates against this rule is *Conn et al. v. Penn et al.*, 1 Wash. C. C. R., 497 (decided in 1818). That was a circuit opinion of Judge WASHINGTON, pronounced in a chancery case, and the principle of his decision upon the question now under consideration, has been since overruled again and again.

3. The next question propounded is, whether the patent issued to the plaintiff can be impeached for fraud or mistake in any of the proceedings anterior to its date, in an action at law, by one claiming under a subsequent grant?

Upon this question there is, apparently, some conflict of authorities; but we think, on a careful examination of the grounds on which the cases are severally decided, there will be found no disagreement upon the general principle involved.

The Circuit Court instructed the jury that the patent was conclusive of the regularity of the preliminary steps; that neither fraud nor mistake in any of the proceedings anterior to the issuing of the patent, could be inquired into. Was such instruction proper? The defendant alleges it to have been erroneous.

The first case cited by the defendant's counsel was *Polk's Lessee v. Wendal et al.*, 9 Cranch., 87 (3 Pet. Cond.

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Bruckner's Lessee v. Lawrence.

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R., 286). That case was ejectment in the Circuit Court for the district of West Tennessee, and the decision was predicated upon a statute of that state, which provides that an *elder* grant founded on a *younger* entry, shall be helden void. The court held, that, under that statute, the priorities between the parties were examinable at law, and that a *junior* patent, founded on a *prior* entry, shall prevail in ejectment against a *senior* patent, founded on a *junior* entry.

*Huidekoper's Lessee v. Burrus*, 1 Wash. C. C. R., 113, (decided in 1804), is also cited by the defendants. This was ejectment also, brought in the Circuit Court for the Pennsylvania district. The land in dispute was granted under a statute of that state, passed in 1792; and the case seems to have been determined, principally, upon a construction of the peculiar provisions of that statute. Nevertheless, the point involved here, was there drawn in question. In his charge to the jury Judge WASHINGTON remarked: "The first point to be considered, is whether a patent is conclusive evidence of the plaintiff's title; because if that be the case, there is no necessity for considering the other points. A patent for land in this country is the act of a public officer, who acts under a special authority, delegated to him by law; and which prescribes the terms upon which it is to be granted. If it is to be granted upon a settlement and improvement, or upon a warrant properly surveyed and located, with settlement, etc., the patent is *prima facie* evidence that everything is regular; and everything is to be presumed in its favor, until proof be exhibited to the contrary. If it appear that there was no incipient right by settlement, or warrant and survey, *with* settlement, as the law directs, then the patent does not vest a title. The warrant and survey give an incipient title, to be consummated by settlement and residence, of which title the patent is but the evidence."

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Bruckner's Lessee v. Lawrence.

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*Stringer et al. v. Young's Lessees et al.*, 3 Pet. R., 341 is also relied upon by the defendant's council. This, too, was ejectment, under the Virginia land laws. At the trial in the circuit, the defendants offered proof that the survey on which the plaintiffs' grant was predicated, had not been returned and recorded in the proper office that the deputy surveyor, who made the survey, was not a surveyor of the county where the land lay, as by law he should be; that the grant issued without any survey having been made, and that the register of the land office issued the grant without proper authority, and that the same was therefore void. All which proof the court rejected. In deciding the case upon error, Chief Justice MARSHALL said: "In Virginia, the patent is the completion of title, and establishes the performance of every prerequisite. No inquiry into the regularity of those preliminary measures, which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud; not legal and technical, but actual and positive, fraud in fact, committed by the person who obtained it; and even this is questioned." He then proceeds to comment upon several cases decided by the state courts, and says: "In *Hambledon et al. v. Wells*, reported in a note to 1 Hen. & Mumf. R., 307, the defendants offered evidence to prove that the grant under which plaintiff claimed, was defective in several prerequisites to a patent. The Court of Appeals in Virginia overruled these objections; but determined that the court below erred in not permitting the appellants to give evidence that the plaintiff procured the plat on which the patent was obtained, to be returned to the office, knowing that an actual survey had *not* been made." The Chief Justice adds: "In this case the objectionable act was a fraud *knowingly* committed by the patentee himself. Even this case has been ques-

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Bruckner's Lessee v. Lawrence.

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tioned, though not, as far as is known, expressly overruled.

In *Witherington v. McDonald*, 1 Hen. & Mumf. R., 306, the defendant offered evidence to show that the survey upon which plaintiff's patent was founded, was illegal; and also that the patent was obtained upon a certificate signed by one Lewis, *as clerk* of the land office, instead of being signed by the register or his deputy, as is required by law. The testimony was rejected; the defendant appealed; and the judgment was *unanimously* affirmed by the Court of Appeals. In the course of the trial, the case of *Hambledon v. Wells*, was mentioned by several of the judges with disapprobation; and it was said, that a single case, decided by three judges against two, was not considered as conclusively settling the law."

The case of *Hoofnagle v. Anderson*, 7 Wheat. R., 212, is cited in the same opinion. That was a suit in chancery, brought to obtain a conveyance for a tract of land in the Virginia military reserve, in the state of Ohio, for which the defendant had obtained a patent. After its emanation, the plaintiff had located a military land warrant on the same land, issued for services performed by an officer in the Virginia line, on the *continental* establishment. The services performed by the officer on whose warrant the defendant's patent had been issued, were in the *state* line; though the warrant was expressed, by mistake, to be for services in the continental line. The court said: "It is not doubted that a patent appropriates the land. Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all, whose rights did not commence previous to its emanation."

In *Boardman et al. v. The Lessees of Reed et al.*, 6 Pet. R., 342-7 (decided in 1832), also cited by defendant's counsel

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Bruckner's Lessee v. Lawrence.

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upon this point, the court instructed the jury that the grant to the plaintiff, which was given in evidence, was a complete appropriation of the land therein described, and vested in the patentee the title; and that any defects, in the preliminary steps by which it was acquired, were cured by the grant. Judge McLEAN, in delivering the opinion of the court, said: "There can be no doubt of the correctness of this instruction. This court have repeatedly decided that at law, no facts behind the patent, can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud; but the defects in an entry or survey, cannot be taken advantage of at law. The patent appropriates the land, and gives the legal title to the patentee. The District Court said nothing more than this; and it was justified in giving the instruction, by the uniform decisions of this court."

*Bagnell et al. v. Broderick*, 13 Pet. R., 455-6-7 (decided in 1839), is then cited by defendant's counsel. A dissenting opinion, delivered in the case by Justice McLEAN, seems to be more particularly relied upon; and it must be admitted that the argument of that able judge, is a very strong one. The facts, too, present as strong a case for the defendants as could possibly be imagined. And if the decision of that case, be received as evidence of what the law is, the question under discussion here, is put entirely at rest. Broderick, the plaintiff, claimed by virtue of a patent from the United States to one Robertson, dated June 17, 1820. Byrne, under whom the defendants claimed, proved a clear *equitable* title in himself, derived, too, from Robertson, long prior to the date of the plaintiff's patent. Judge McLEAN says: "It appears that the patent was issued to John Robertson, Jr., improperly; as, in 1809, he conveyed all his interest in the land. Before the emanation of the patent, he had not a shadow of title, either equitable or

*Bruckner's Lessee v. Lawrence.*

legal, to the land in dispute. And the patent must have been fraudulently obtained by him on the presentation of the certificate of location made by Byrne. The evidence on this point is too clear to be controverted. It is established by deeds executed in the most solemn form, and by records which contain the highest verity. The inference of the fraud is as irresistible, as are the facts from which it is inferred. The proof of Byrne's title is irrefragable. And it is equally clear, that Robertson had no title to the land, until he fraudulently obtained the patent. Having no shadow of right, he could obtain the patent, in his own name, by no other than fraudulent means. And no court which could feel itself authorized to look behind the patent, could hesitate to pronounce the title of Byrne valid against the patentee, who has sought to cover his fraud by this legal instrument." This case arose in Missouri, and was one of the New Madrid claims, growing out of an act of congress passed in 1815; and it seems there is a statute of that state, declaring, in effect, that a court of law may do, in an action of ejectment what it would be competent for a court of chancery to do. Judge McLEAN's opinion is evidently based upon that statute; for he says, again: "Why may not a court of law protect the better right of Byrne? The right may be investigated as fully, and, considering the nature of the rights under the Missouri statute, as safely in a court of law as in a court of chancery. But this with the court is not a question of policy. It is a rule of evidence and of property adopted by the state of Missouri, and our whole course of adjudications requires us to regard it. There is, therefore, no more violation of principle in examining the title of Byrne at law, than in equity. The result is substantially the same in both modes; as the title of Byrne must be protected from the fraud by which it has been attempted to

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Bruckner's Lessee v. Lawrence.

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be overreached and subverted." And he adds: "Judging from the evidence of this case, I have never seen a grosser act of fraud, than the obtainment of this patent by Robertson; eleven years after he had conveyed every vestige of right in the land which was relinquished as the consideration to the United States for the location in controversy. It is a well settled principle, that fraud may be investigated as well at law as in chancery; and I am strongly inclined to think if this fraud had been brought before the court and jury, independent of the statute of Missouri, they must have determined that it vitiated the patent."

But all the Judges, except Justices McLEAN and McKinley, adhered to the decisions formerly made upon this question, and Justice CATRON, who delivered the opinion of the majority of the court; cited the cases in Wheaton and Peters, which I have before referred to, adopting their argument and language. He said: "The patent to John Robertson, Jr., is deemed to have been issued regularly; and we must presume that all the usual incipient steps had been taken before the title was perfected. The patent merged the location certificate on which the survey was founded; so that no second survey could be made by virtue of the certificate." "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government, in reference to the public lands, declares the patent, the superior and conclusive evidence of legal title; until its issuance, the fee is in the government, which by the patent passes to the grantee, and he is entitled to recover the possession in ejectment."

The counsel for the plaintiffs cited for our consideration, upon the branch of the case now under consideration, many of the authorities already adverted to, and several

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Bruckner's Lessee v. Lawrence.

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additional ones, all bearing, with greater or less might, upon the question. But we think it unnecessary to analyze or comment upon them: *Stringer et al. v. Lessees of Young et al.*, 3 Pet. R., 388-40-41; *Boardman et al. v. Reed et al.*, 6 Pet. R., 328, 342, 313; *United States v. Attedondo et al.*, 6 Pet. R., 724-5-7-8-32; *Patterson v. Winn et al.*, 5 Pet. R., 241; *Brown v. Jackson*, 7 Wheat. R., 218; *Jackson v. Lawton*, 10 Johns. R., 23.

I will, however, advert for a moment to *Johnson v. Lawton*, 10 Johns. R., 23, that being a case in a state court. The plaintiff claimed under a patent dated October 28, 1811, and the defendant offered in evidence a patent to one Allen (under whom he claimed), dated March 5, 1812. The patent to Allen recited that the previous one to the plaintiff was issued through mistake. Defendant also offered to prove by parol, that Allen was in possession of the lot in controversy, in August, 1803, and had paid the state treasurer \$1,480.60, in full of principal and interest due for the lot. The court rejected the defendant's patent and parol evidence, and the plaintiff had a verdict. On a motion to set aside the verdict and for a new trial the case was argued in the Supreme Court, and KENT, then Chief Justice, delivered the opinion, saying: "The patent granted to the plaintiff, being the elder patent, is the highest evidence of title. As long as it remains in force, it is conclusive as against a junior patent for the same land.

"If the lands passed by the first patent, the record is without operation and void. It has been the uniform practice in our courts, in all questions of title, to look to the elder patent and give it effect. Nor can the court take notice of any equitable claim upon the general government, which a third person might have had in respect to the lands in question, prior to the issuing of the patent.

"Letters patent are matters of record, and the general

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Bruckner's Lessee v. Lawrence.

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rule is, that they can only be avoided in chancery, by a writ of *scire facias*, sued out on the part of the government, or by some individual prosecuting in its name. This is the settled *English* course, sanctioned by numerous precedents; and we have no statute or precedent, establishing a different course here."

On the investigation which we have been able to make of this question, we are left without a single doubt. We think the charge of the Circuit Court of Monroe county to the jury on this point, was clearly right.

4. The remaining inquiry is, whether a deed, executed while a third person is in the possession holding the premises adversely to the grantor, passes the title so as to enable the grantee to recover in ejectment, or whether it is inoperative and void.

The first question is, whether the doctrine of adverse possession obtains at *common law*.

If it be a part of the common law, not repugnant to the ordinance of 1787, or to the laws of Michigan in force on the 7th of May, 1835, and be applicable to our condition and circumstances, it was then of force here, and rendered the conveyance from Watson to the plaintiff inoperative and void as to that portion of the land claimed by the plaintiff, which the defendant held adversely to him. That the selling pretended titles, as it is called, was in violation of the common law, before the enactment of the statute of 32d *Henry VIII*, cannot be questioned. *Partridge v. Strange et al., Plowd.*, 88, expressly affirms the proposition. Chief Justice MONTAGUE, who presided in the trial of that case, says: "It seems to me that a pretended right or title is in but one case, and that is where *one* is in possession of lands or tenements, and *another* that is *out* of possession claims them, or sues for them; that is a *pretended right or title*. Further—"I take the statute, that if

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Bruckner's Lessee v. Lawrence.

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he who is out of possession bargains or sells, or makes any covenant or promise to part with the land after he shall have obtained possession of it—this shall be within the danger of the statute, whether he who so bargains, sells, or promises, have a good and true right and title or not; and in this point the statute has not altered the law, for the common law, before this statute was, that he who was out of possession might not bargain, grant, or let his right or title, and if he had done it, it should have been void." See also *Cb. Litt.*, 847. In New York, every grant of land (except as a release) is void as an act of maintenance, if, at the time, the lands are in the actual possession of another person claiming under a title adverse to that of the grantor. This principle has always been received as settled law in that state. Chancellor KENT says: "It was a principle conformable to the whole genius and policy of the common law, that the grantor in a conveyance of land (unless in the case of a mere release to the party in possession) should have in him at the time, a right of possession:" 4 *Kent's Com.*, 446-7. BLACKSTONE says the same doctrine prevails in the code of all well governed nations, for possession is an essential part of title and dominion over property: 2 *Bl. Com.*, 311. Chancellor KENT says again: "It seems to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath capacity as well as the intention to deliver possession:" 4 *Kent's Com.*, 448.

That the inhibition of the sales of pretended titles, constitutes a part of the common law, we think is incontrovertible. That it has been adopted and is regarded as such by most of the states of this Union is certain, and we can discover no reason why it should not be so regarded in this state. Article 2, of the Ordinance of 1787,

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*Bruckner's Lessee v. Lawrence.*

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before referred to, provides, among other things, that the inhabitants of said territory (meaning the territory northwest of the river Ohio), shall always be entitled to the benefit of judicial proceedings according to the course of the common law.

The instruction given to the jury, therefore, on this point, was in accordance with law.

Booth v. McQueen.

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**Susannah Booth v. James McQueen.**

A defendant who is found guilty and adjudged the father of a bastard child, and chargeable with its maintenance, on complaint under the provisions of Chapter 6, Title 9, Part 1 of the R. S., is not liable for the costs of the proceeding.

Costs are in consequence of some default, and are not awarded by the common law, but depend entirely upon statutory provisions. Where no authority is given by statute there can be no taxation.

**FELCH, J.:** This was a proceeding against the defendant, upon a complaint charging him with being the father of a bastard child, tried at the Eaton Circuit, under the provisions of Chapter 6, Title 9, Part 1 of the R. S. Upon the trial of the cause the jury found the defendant guilty, and an order was thereupon entered adjudging him to be the father of such child, and that he stand chargeable with the maintenance thereof, and pay a specified sum per week, to said Susannah Booth. The only question presented in the case, and which was reserved by the presiding judge who tried the cause, is whether the defendant is liable for costs.

The chapter of the revised statutes above mentioned, which comprises all the provisions of law, in reference to proceedings in cases of affiliation, is entirely silent as to costs. Costs are in consequence of some default, and are not awarded by the common law: *Clinton v. Strong*, 9 *J. R.*, 370. They depend entirely with us upon statutory provisions; and, where no authority is given by the statute, there can be no taxation. Chapter 1, Title 5, Part 3, of the Revised Statutes, contains the general authority by virtue of which costs are taxed in this state. The provisions of this statute give costs to the plaintiff, whenever he shall recover judgment in any action or proceeding at law, in any court of record, in the cases there enumerated.

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The People v. Kent.

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The proceedings in cases of affiliation are of a peculiar character, defined by the act by which they are given, and clearly not within the cases enumerated in the chapter relative to costs and fees above mentioned. There being, then, no statutory provisions authorizing the Circuit Court to award costs against the defendant, the plaintiff's motion for such taxation must be denied.

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The People v. Patrick Kent.

In an indictment under the statute (*S. L. 1840*, p. 48, sec. 1), which provides for the punishment "of larceny, by stealing of the *property of another*," "*any bank-note, bank-bill,*" etc., a description of the property stolen as *bank-notes or bank-bills* merely, following the language of the statute, is sufficient. (a)

An allegation in such indictment, that the bank-bills were the *goods and chattels* of W. and K., is a sufficient averment that they were their *property*. The word *chattels* denotes property and ownership.

Motion in arrest of judgment, after verdict of guilty, on the trial of the defendant on an indictment for larceny in the Circuit Court for the county of Washtenaw, before Hon. Wm. A. FLETCHER, presiding judge, who reserved the questions arising on the motion for the determination of this court. The grounds of the motion appear in the opinion of the court.

*E. Mundy*, prosecuting attorney, for the people.

*R. S. Wilson* and *O. Hawkins*, for defendant.

**FELCH, J.:** This was an indictment for larceny, charging the defendant with stealing "six promissory notes, issued

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(a) *Rice v. People*, 15 Mich., 9, 18, to same effect. See *Brown v. People*, 29 Mich., 282; *Merwin v. People*, 29 Mich., 298; C. L. 1871, § 7930.

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The People v. Kent

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by the Bank of Michigan, of the denomination of five dollars each, commonly called bank-bills, of the value of thirty dollars; six bank-bills, each of the denomination of five dollars, issued by the Bank of Michigan, at Detroit, in said state, of the value of thirty dollars; six bank-bills, of the denomination of five dollars each, of the value of thirty dollars, of the *goods and chattels* of one Samuel Warner and one George Klinedob."

The defendant's counsel contended, both on the trial and also on a motion in arrest of judgment, after a verdict of guilty, that the indictment was insufficient; because,

1. It does not set forth with sufficient certainty a banking incorporation, or that the bills were issued by an incorporation having power to issue them; that stating them to have been issued by the Bank of Michigan, without stating them to have been issued by the president, directors and company of the Bank of Michigan, and averring that they were issued by them in their corporate character, is insufficient.

2. It does not aver that the bills stolen were payable in money, or that they were due and payable.

3. Nor that they were the bills of the Bank of Michigan, but only, that they were *issued* by the Bank of Michigan.

4. The description of the bills is too general, and, therefore, bad.

5. The allegation that they were the *goods and chattels* of Warner and Klinedob is insufficient.

The questions arising upon these several objections were reserved by the presiding judge for the determination of this court.

The statute under which the indictment was found (*S. L. 1840*, p. 42) provides "that every person who shall commit the offense of larceny, by stealing of the property of another, any money, goods or chattels, or any bank-note,

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The People v. Kent.

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*bank-bill, bond, promissory note, due-bill, bill of exchange," etc., "shall, on conviction thereof, be punished by imprisonment," etc.*

By the common law no indictment could be sustained for stealing mere *choses in action*. This rule had its origin long anterior to the establishment of banks, and the issuing of bank-notes or bills. More recently this species of property has become, both in England and in most of the states of this Union, the subject of penal statutory enactments, which have received frequent judicial construction.

It is laid down, as a general rule, that when the *subject matter* is defined by statute, the descriptive words contained in the act should be also used in the indictment; and, although it is said to have formerly been the practice, upon all indictments for stealing notes or other written securities, to set out the notes or other securities at full length, yet it has been long settled that they may be described in a general manner, and need not be set out *verbatim*: *2 Russ. Cr.*, 169-70. It is enough if the indictment follow some of the descriptions of property given in the statute. The indictment in *Rex v. Johnson*, 3 *M. & Sel.*, 539, for embezzling bank-notes, under 39 *Geo.*, 3, c. 85, described the notes as "divers, to wit, nine bank-notes, for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £9, of like lawful money," etc. The court held that this was a sufficient description. Lord ELLENBOROUGH, C. J., said that he considered that, after the statute had made bank-notes a subject of larceny, they might be described in the same manner as other things which have an intrinsic value, that is by any description applicable to them as a chattel." "If bank-notes be recognized by that description in the act of parliament, the indictment has done enough in laying them under that description." *Lx*

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*The People v. Kent.*

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BLANC J. observed that, "where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny." "It is not necessary to describe a bank-note particularly as a bank-note for the payment of £1, £5 or £20, because for whatever sum it may be payable, it is still a bank-note." "No further description is necessary than is required for other chattels which are the subject of larceny, and, under the general name of bank-note, the particular species, if the sum for which the note is payable can be said to constitute a species, may be proved." In *The People v. Holbrook*, 13 Johns. R., 90, the defendant was indicted for stealing "four promissory notes, commonly called bank-notes, given for the sum of \$50 each, by the Merchants' Bank in the city of New York, which were then and there due and unpaid, of the value of \$200; and four other promissory notes, given by the same bank, for \$20 each, which were then due and unpaid, of the value of \$80, the *goods and chattels* of Peleg Clark," etc. It was objected that the indictment should have set forth the notes more at large, with proper averments of the authority of the bank to issue such notes. But the court decided upon this point, that the description was sufficient; that the notes being supposed to be in the hands of the defendant, it was impracticable to state them *in hæc verba*; and that a general description was all that was required. It was also objected in the case last cited, that the indictment did not aver the notes to be the *property* of any person; but only that they were the *goods and chattels* of P. C. The statute under which the indictment was found, like our act of 1840, above quoted, made it a penal offense to steal any bank-note, etc., the *property* of another. But the court held the indictment sufficient, and that *chattels*, when so applied, denoted property and ownership. In *The Commonwealth v. Richards*, 1 Mass. R., 337,

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*The People v. Kent.*

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the indictment found under a statute, which provided that any person who should feloniously steal "any note or certificate of any bank, or any public office, securing the payment of money to any person, or certifying the same is due, shall be punished," etc., alleged that the defendant stole "a bank-note of the value of \$10, of the goods and chattels of A. B.;" and it was held sufficient on motion in arrest of judgment, assigning as reasons that the bank-bill was insufficiently described in the indictment; it not appearing to have been issued by any bank authorized to issue bills, or that it contained any promise by any person, etc. See also *Commonwealth v. Cary*, 2 Pick. R., 47.

Our statute having made the stealing of bank-bills or notes *eo nomine* larceny, the principles established by the authorities above cited apply in this case. The description as *bank-bills or notes merely*, following the language of the statute, is sufficient. It is enough to state the larceny to have been committed, by stealing that which the statute has described as the subject of larceny.

Let us, however, examine in detail the several objections urged to this indictment.

1. It was not necessary to set out the act of incorporation of the bank by which the bills purport to have been issued, or that they were issued by an incorporation having power to issue them, as urged by the first objection taken to this indictment. This is decided by *Rex v. Johnson*, *People v. Holbrook*, and *Commonwealth v. Richards*, above cited. Nor is there any force in the objection, that the bills are stated to have been issued by the bank of Michigan, instead of the president, directors and company of the Bank of Michigan. The naming of the Bank is only descriptive of the bill or note, and the description in the indictment is itself perfect without it. If it is found to vary from the true corporate name of the institu-

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*The People v. Kent.*

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tion by which the stolen bills were in fact issued, it would be no cause for arresting the judgment. Such variance could only be taken advantage of by objection to the admissibility or sufficiency of the evidence on the trial.

2. Neither was it necessary that the indictment should aver that the bills stolen were payable in money, or that they were due and payable, as urged by the *second* objection. The statute does not require it. And in *Rex v. Johnson*, where an indictment under a similar statute described the notes as *bank-notes for the payment of money*, it was said by the court that the description was larger than the statute required. See also *Commonwealth v. Richards*, above cited.

3. If it was necessary, as assumed by the *third* objection, that the indictment should aver, that the bills were the bills of the Bank of Michigan, we think the words used were sufficient. The *issuing* of a bill by the bank, as stated in the indictment, is equivalent to a statement that it was a bill of the bank.

4. The *fourth* objection, viz., that the description of the bills is too general, is fully answered by the principles and authorities above referred to.

5. We have already seen that the very point raised by the *fifth* and last objection, was expressly decided in *The People v. Holbrook*. The allegation that the bills were the "*goods and chattels*" of Warner and Klinedob, is a sufficient averment that they were their *property*. The word *chattels* denotes property and ownership.

We are of opinion that the indictment was sufficient.

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Pullen v. The People.

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**Lydia Pullen v. The People.**

The return of a court of special sessions to a *certiorari*, stated that on complaint for larceny, L. P. and one R. C. were jointly arrested and jointly examined, and that a separate trial was granted to L. P. on request of her counsel, merely. *Held* equivalent to a statement that they were jointly charged in the same complaint with the commission of the same offense.

Where two persons are jointly charged in the same complaint with the commission of the same offense, and neither of them has been either acquitted or convicted, the husband of one is not a competent witness for the other, who, by leave of the court, is tried separately. (a)

In error on *certiorari* from three justices of the peace for the county of Wayne, composing a court of special sessions. The return to the *certiorari* shows that on complaint made pursuant to the statute (*S. L.* 1840, p. 66-7), charging Lydia Pullen, the plaintiff in error, and one Roxy Calkins with larceny, they were jointly arrested, and jointly examined; that a separate trial was granted to the plaintiff in error on request of her counsel, merely, and that she was tried by a jury before said court May 24, 1841. On the trial, Warner Calkins was offered as a witness for the plaintiff in error, and rejected by the court as incompetent, because he was the husband of Roxy Calkins, who was arrested and examined jointly with the plaintiff in error.

*A. & H. H. Emmons*, for the plaintiff in error.

*J. A. Van Dyke*, for the people.

**FELCH, J.:** The only question presented by this case is, whether Warner Calkins was properly rejected by the court as an incompetent witness for the plaintiff in error.

It is contended by the counsel for the plaintiff in error,

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(a) The disability growing out of the marital relation has been removed by statute: *Morrisey v. People*, 11 Mich., 327; but the case so far as it decides that a party in the same indictment is not a competent witness for his co-defendant until he has been either acquitted or convicted is affirmed in *Grimm v. People*, 14 Mich., 300, and the disability is held not to be removed by statute.

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*Pullen v. The People.*

that the return does not show that the plaintiff and Roxy Calkins were, in fact, charged jointly with committing the offense.

By the provisions of the statute organizing courts of special sessions (*S. L.* 1840, p. 67, sec. 3), the warrant, by virtue of which the defendant is arrested, is required to recite the accusation charged in the complaint; and, by sec. 11, it is provided that, when the defendant is brought before the court of special sessions, the *charge* as stated in the warrant of arrest or commitment shall be distinctly read to him and he is required to plead thereto. This charge is the same as an indictment in a court of record, and must be against all who are mentioned in the warrant of arrest. The statement in the return, that the two were jointly arrested and jointly examined, and that a separate trial was granted to the plaintiff in error, must be considered the same as a statement that they were jointly charged in the same complaint, with the commission of the same offense, and is the same in effect as a charge against two in an indictment.

It appears to be a well settled rule of evidence that a party in the same indictment is not a competent witness for his co-defendant, until he has been first either acquitted or convicted; and whether the defendants be tried jointly or separately does not vary the rule: *People v. Bill*, 10 Johns. R., 95; *The State v. Mooney et al.*, 1 Yerg. Tenn. R., 431; 1 *Ph. Ev.*, 62; *Commonwealth v. Marsh & Barton*, 10 *Pick. R.*, 57.

The rule of law seems to be almost universal, that, where either husband or wife is incompetent, whether in a civil or a criminal case, the other is incompetent also: 2 *Stark. Ev.*, 707. This incompetency is founded in part on the identity of their legal rights and interests, and in part on principles of public policy, which protect domestic quiet and harmony, and forbid the manufacture of evidence to secure

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*Pullen v. The People.*

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an object in which both are interested. In *The Commonwealth v. Marsh et al.*, cited above, WILDE, J., states as a reason why one of two co-defendants jointly indicted for altering a forged note, and whose trial had been postponed, was an incompetent witness for the other, that "if parties charged with an offense were permitted to testify for each other, they might escape punishment by perjury." By obtaining separate trials, each "defendant in his turn might be admitted to testify, and thus they would be allowed mutually to protect each other and to evade the ends of justice." If the interest of a co-defendant in the investigation of a crime in which he is charged to have participated is such as to render him incompetent, surely his wife, or, if the wife be indicted, her husband, would be incompetent for the same reason.

But we are not without authorities on the question presented by this case. In *The Commonwealth v. Easland et al.*, 1 Mass. R., 15, five persons were indicted for assault and battery, and were on trial together. The wife of one of the defendants was offered as a witness in behalf of the other four. The court ruled unanimously that she could not be examined, and remarked that, if the other defendants wished for the benefit of her testimony, they should have moved to be tried separately from her husband. This remark was a mere *dictum*, the question of the competency of the wife on their separate trial not being before the court. This case is cited in 1 *Cow. & Hill's Notes to Ph. Ev.*, 148, where the authors not only question the authority of this *dictum*, but cite the case of the *People v. Bill*, 10 Johns. R., 95, as establishing the doctrine that one defendant was not a competent witness for his co-defendants where they severed; from which they deem it a necessary inference that the wife of such defendant would also be incompetent. In the *People v. John Colbourn and Elizabeth Weir*, 1 Wheeler's Cr. Ca., 497, the defendants

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Horner v. Fellows.

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were jointly charged in an indictment with forging a check on the North River Bank. Colburn only was put upon his trial; and Edward Weir, the husband of Elizabeth Weir, was called as a witness. The court rejected the testimony, and decided that, to render the witness competent, his wife, Elizabeth Weir, must first have been tried and acquitted by the jury.

In South Carolina a different rule appears to have been adopted: *State v. Anthony*, 1 *McCord's R.*, 285.

*Judgment below affirmed.*

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#### Horner and Adams, Administrators of Woodruff, v. Fellows.

Evidence of the statement of an agent, made nine months after he had sold property for his principal, that he knew at the time of the sale that it was good for nothing, is inadmissible to affect the rights of his principal. (a)

Evidence that the vendor of property represented to the purchaser, at the sale, that it was good, without knowing it to be so, and that it proved to be bad, will not establish fraud in the contract of sale. It must be further proved that the vendor knew such representation to be false when he made it.

Representations as to the quality of property, made by the vendor pending a negotiation for its sale, are merged in an express warranty of such quality, made by him on the consummation of the contract of sale which results from such negotiation; and, unless the purchaser can prove that such representations were known by the vendor to be false when he made them, and thus establish *fraud*, he must rely solely upon the warranty, for the remedy of any injury sustained in consequence of the falsehood of such representations.

The agent of W. sold a fanning-mill to F., representing that it was good, and would do a good business, and took F.'s note for it, to which it was added, that the note was given for the mill, which was warranted to be good and to do a good business, and that if it was not good, F. was to have the privilege of returning it within a

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(a) Same principle: *Benedict v. Denton*, Walk. Ch., 396; *Converse v. Blumrich*, 14 Mich., 110, 122.

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Horner v. Fellows.

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certain time, and W. was to furnish a new mill, in exchange, which should be good. In an action by W.'s administrators, on the note, *Held*, that unless it was shown that W. or his agent knew at the time of the sale that the mill was not good, F. was bound to return it according to the condition annexed to the note, before he could avail himself of any defect in the mill on his defense.

Case certified to this court by the presiding judge of Washtenaw Circuit Court, for the determination of questions reserved at the trial.

*E. W. Morgan*, for the plaintiffs.

*E. Lawrence*, for the defendant.

RANSOM, J.: This case was tried in the Washtenaw Circuit Court, on appeal from a justice of the peace. The action was brought by the plaintiffs, as administrators of E. Woodruff, deceased, for the recovery of the amount claimed to be due upon the following note or contract made by the defendant:

"\$20.

Lodi, Sept. 8, 1837.

"One year from the first day of January next, for value received, I promise to pay E. Woodruff or bearer, twenty dollars, with use. The above note was given for a fanning-mill, which was warranted to be good and to do good business. If not good, the signer has the privilege of returning it to Woodruff's shop, in Plymouth, in the month of January next, at which place said Woodruff agrees to furnish a mill, which shall be good, in exchange therefor.

FESTUS A. FELLOWS."

To the declaration, which was in *assumpsit* upon this instrument, the defendant pleaded the general issue, set-off, want of consideration, and that the note was fraudulently obtained.

On the trial the defendant introduced evidence to prove that one Odell, who acted as the agent of Woodruff in making the sale of the fanning-mill mentioned in the note

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Horner v. Fellows.

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or contract, and for which the note was given, represented, at the time of the sale, *that the mill was good and would do a good business.*

He then offered to prove that, about nine months after the sale, Odell, being still the agent of Woodruff, stated to the defendant, that he, Odell, *knew*, at the time of the sale of the mill, that *it was good for nothing*; which evidence, being objected to by the plaintiffs, was rejected by the court.

The defendant further proved that the mill was *worthless*, although Odell did not know whether it was good or not at the time of the sale; that, in February, 1838, he returned it to the shop of Woodruff, who was absent, and the foreman of the shop offered him another mill in exchange, which, however, he did not take at that time; nor did Woodruff accept the old mill on his return.

The court refused to charge the jury that if Odell, the agent of Woodruff, represented the mill *as good not knowing whether it was good or not, and it turned out to be not good, it was evidence of fraud in obtaining the note.*

The court charged the jury that, unless Woodruff, or his agent *knew the mill was not good*, the defendant was bound to return the same according to the condition of the note or contract, before he could avail himself of any defects in the mill as a defense to this action.

The jury found a verdict for the plaintiffs.

Upon this statement of facts, which is properly certified to this court, the following questions arise:

1. Was the evidence offered by the defendant to prove the declarations of Odell, the agent of Woodruff, made subsequently to the sale of the mill and to the execution of the note given for it by the defendant, properly rejected by the court?

We are clearly of the opinion that the evidence was properly rejected. The statements and declarations made

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Horner v. Fellows.

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by an agent while he is contracting for his principal, within the scope of his authority, and having reference to the subject matter of such contract, constitute a part of the *res gestae*, and may be given in evidence to affect his principal; but not what he says at another and subsequent period. His declarations are received, not as *admissions* of his principal, but as part of the *res gestae*: *Haven v. Brown*, 7 *Greenl. R.*, 424; *Leeds v. Marine Ins. Co. of Alexandria*, 2 *Wheat.*, 380; *Fairlie v. Hastings*, 10 *Ves.*, 123; *Westcott v. Bradford*, 3 *Wash. C. C. R.*, 500; *Thallhimer v. Brinkerhoff*, 4 *Wend. R.*, 394; 1 *Esp. Cas.*, 375; 7 *Serg. and Rawle R.*, 109; 2 *Pick. R.*, 532.

2. Did the court err in refusing to instruct the jury that if Odell, the agent, represented the mill as *good, not knowing it to be so*, and it proved to be *not good*, it was evidence of *fraud*?

We think not. Whatever representations were made by Odell in relation to the quality of the mill, pending the negotiation, were merged in the written contract in which the negotiation resulted. The defendant chose to reduce those representations into an express warranty. Upon that he must rely, unless there was actual fraud in the sale. In *Culver v. Avery*, 7 *Wend. R.*, 386, the court say: "Whatever is said, in *good faith*, in a treaty for a sale or purchase, is *merged* in the purchase itself, when consummated, and you cannot overhaul it, whether the representations were true or false; but it is otherwise if they were known to be *false* when made." So also, *Welsh v. Carter*, 1 *Wend. R.*, 189.

3. Did the court err in charging the jury that, unless Woodruff or his agent *knew* the mill was not good, the defendant was bound to return it according to the condition of the note or contract, before he could avail himself of any defect in it, on his defense?

We think the court charged the jury correctly. *Hills*

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Horner v. Fellows.

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v. *Bannister et al.*, 8 Cowen 33, bears directly upon this point. The action was upon a note given by the defendants, for a church bell. The plaintiff, at the time of the sale, agreed in writing to warrant the bell not to crack for one year; and to recast it if it should crack within that time. It was proved on the trial, that at the time of the purchase, Hills, the plaintiff, and one Hanks were in company; that the bell cracked within the year, and that the defendants went to the place where Hanks had formerly kept his shop in Auburn, to get it recast, but he had left the country, and they could not find him. In deciding the case, the court said: "It was provided that if there should be a breach of warranty, the defendants should be entitled to redress by having the bell recast. Until there was a refusal to comply, there was no right of action in the defendants. The evidence was insufficient to show that the persons warranting were in default. For aught that appears, Hills was at his place of business, ready and willing to recast the bell; and yet no application was made to him. Damages for non-performance do not arise in such a case, until neglect or omission be shown, after a request to perform."

But in *Pinney v. Hall*, 1 Hill R., 90, the facts were almost identical with those of the present case, and the court remarked: "It is quite clear upon the evidence, that the plaintiffs were ready and willing to take back the first mill and furnish the defendant with another, in pursuance of the contract. The defendant declined taking another. The parties provided by the contract what should be done, in case the defendant should be dissatisfied with the mill. He was to return it and take another. That was his remedy. He had no right to refuse taking another mill, and then insist on an abatement in the price agreed to be paid for the first."

In the case at bar, the defendant did not even return the

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*Parks v. Goodwin and Hand.*

mill until after the time had elapsed within which, by the contract, he had a right to do so. The defendant's agreement to pay the contract price for it had become fixed and absolute. The plaintiff was then under no obligation to receive back the first mill and furnish the defendant with another, but had a right to insist upon the payment of the note. Nothing less than *actual fraud* in the sale, by the plaintiff or his agent, could defeat his recovery; *that the jury did not find upon the evidence.*

Judgment should be entered upon the verdict.

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*Parks v. Goodwin and Hand.*

A writ of summons returnable before a justice's court, will not be set aside on account of the omission of the plaintiff to comply with the statute (*R. S., 1838 p. 105. § 51*), requiring non-resident plaintiffs to give security for costs before process shall issue; provided the plaintiff gives such security *nunc pro tunc*, before a motion to set aside the writ is granted. (a)

It has been the settled practice of the Circuit Courts to permit original writs to be indorsed *nunc pro tunc* by security for costs, or by the plaintiff's attorney, where either of these indorsements (which, by the statute—*R. S. 1838, p. 418, §§ 4, 8*—are required to be made *before service* of the writ), have been omitted; and this even after motion made to set aside the writ, on the ground of such omission. (b)

### Error to the Oakland Circuit Court.

RANSOM, J.: This was an action of *assumpsit*, commenced by summons, before a justice of the peace of Oakland county. The defendants in error, who were the plaintiffs below, were non-residents, and neglected to file security for costs. The plaintiffs moved the justice on this ground to set aside the summons; whereupon the defendants filed security for costs. The court then refused to grant the plaintiff's motion.

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(a) C. L. 1871, § 5259, *Idem.*

(b) C. L. 1871, § 5728, *Idem.*

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Parks v. Goodwin and Hand.

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The statute in force at the time this suit was commenced (*R. S.* 1838, p. 405, § 51) required that, in all cases, non-resident plaintiffs should give security for costs before process issued. It is urged by the plaintiff, that the giving the security was essential to confer on the justice jurisdiction of the parties. But the statute does not make the giving the security a condition, on compliance with which, only, the process shall issue. Nor does it provide that the process shall be void, or be quashed, or set aside, if such security should not be given. The court having general jurisdiction of the subject matter and of the parties, may proceed to final judgment, unless the defendant move to set aside the process for this defect. Such a motion, when made, must prevail, unless the plaintiff in the suit furnish the requisite security. But where no motion is made, the objection is deemed to be waived and the defect cured.

This is a settled rule in the Circuit Courts, under a similar statute. *R. S.* 1838, p. 418, § 4, provides, that "all original writs, in which the plaintiff is not an inhabitant of this state, shall, before the service thereof, be indorsed by some sufficient person, who is an inhabitant of this state." The subsequent section provides, that "every such indorser shall be liable, in case of the avoidance or inability of the plaintiff, to pay all such costs as shall be awarded against the plaintiff." True, this statute requires the security to be given before the *service*, the other before the *issuing* of the process. But this difference is unessential. Again, *R. S.* 1838, p. 418, § 8, declares that "original writs shall be indorsed by the attorney for the plaintiff, before the service thereof." Under these provisions, we have always held it competent for the Circuit Courts to permit original writs to be indorsed *nunc pro tunc*, either as security for costs, or by the attorney, when either indorsement may have been omitted before service; and this, too, after

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*Parks v. Goodwin and Hand.*

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motion to set aside the writ or service on the ground of such omission. This was done in the present case, and we think properly.

The only object of these several provisions is to secure the defendant against costs, in case judgment is finally rendered in his favor; and this object is secured as effectually by an indorsement or giving security *after* the issuing or service of a writ as *before*.

The case of *Neckerman v. Finch*, 15 Wend. R., 652, is relied upon by the plaintiff. The statute of New York provided, that a warrant might issue where the plaintiff was a non-resident and tendered to the justice security for the payment of any sum which might be adjudged against him in the suit. A warrant had issued without security being first given, although it was put in on the evening of the same day. The court decided, that the security must be tendered before the writ could issue. And very properly; for, under that statute, the tendering the security, like the filing an affidavit of the amount due, etc., under our attachment law, is an indispensable prerequisite to the issuing of the process, without which all proceedings would be utterly null and void.

There is another New York statute, more analogous to the statute of our own state now under consideration. It provides that a foreign corporation, created by the laws of any other state or country, may, upon giving security for the payment of the costs of suit, prosecute in the courts of that state. In the case of the *Bank of Michigan v. Jessup*, 19 Wend. R., 10, a motion was made to dismiss, for the same reason urged here, that security for costs had not been given. NELSON, C. J., in deciding the motion, said: "The plaintiffs were irregular in prosecuting the suit without giving security. Having now complied with the statute, the motion is denied," etc.

Such, we think, is the proper construction of the statute

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*The People v. Tisdale.*

under consideration. Such was the construction given to it by the justice of the peace who tried the cause ; and also by the Circuit Court of Oakland county, where the subject was again considered on appeal.

There is, therefore, no error in the record in this case, and the judgment below must be affirmed.

*Judgment affirmed.*

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***The People ex rel. Attorney-General v. Henry Tisdale.***

Where a person intrudes himself into an office, in consequence of the unlawful decision of a board of canvassers, the remedy, by motion to this court for leave to file an information in the nature of a *quo warranto* to try the right to such office, is proper.

The court have a discretion, as to the granting of such motions.

The statute makes the evidence contained in the ballots of voters, the foundation of the statements to be prepared both by the inspectors of election and by the county canvassers, and also of the certificate of election issued by the latter.

The ballots of the electors, as shown by the statements of the inspectors of election, are the only evidence upon which the county board of canvassers can act. They have no power to examine witnesses, or receive other evidence, to prove for whom a ballot was intended.

Nor would any other evidence be admissible, on a trial before a jury of an issue awarded from this court, in a proceeding by information in the nature of a *quo warranto* to try the right to an office; but the simple inquiry would be, what was the intention of the elector, expressed by his ballot.

A ballot for *J. A. Dyer*, cannot be counted for *James A. Dyer*. It does not contain the name, the designation by written characters, of *James A. Dyer*; and no evidence is admissible to show that it was intended for *James A. Dyer*. (a)

But where the designation of an individual, on a ballot, is by an abbreviation sanctioned by common usage and universally understood, the ballot may be counted for

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(a) Affirmed in *People v. Higgins*: 8 Mich., 233, and *People v. Cicott*, 16 Mich., 233; but in the latter case *Christiancy, J.*, questioned its correctness in principle, and *Cooley, J.*, dissented. That the rule as to initials does not extend to other than election cases, see *Rice v. People*, 15 Mich., 9, 16.

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*The People v. Tisdale.*

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the person for whom it was evidently intended. Thus, a vote for Jas. A. Dyer, may be counted for James A. Dyer. (b)

Nor, it is presumed, would a slight error in the spelling of a name, on a ballot, prevent the ballot from being counted for the person for whom it was evidently intended.

Motion for leave to file an information in the nature of a *quo warranto*, to inquire by what right Henry Tisdale claims the office of sheriff of Jackson county.

*A. B. Bates*, for relator.

*Chapman & Johnson, contra.*

FELCH, J., delivered the opinion of the court. This is an application for leave to file an information in the nature of a *quo warranto*, to test the right of Henry Tisdale, the respondent, to hold the office of sheriff of Jackson county.

The affidavit of James A. Dyer, upon which this application is founded, states that he, said Dyer, and said Tisdale, and one Harvey Austin, were put in nomination for said office of sheriff, previous to the general election in the fall of 1842, and were the only candidates for that office; that, subsequent to the holding of said election, said Tisdale was, by the board of canvassers, declared duly elected to said office, and has taken the oath and entered upon the duties thereof; and that the votes given at said election, as returned to the board of canvassers, were as follows, viz:

For Henry Tisdale, 822 votes, For H. Tisdale, 1 vote.

" James A. Dyer, 820 " " Jas. A. Dyer, 1 "

" Harvey Austin, 388 " " J. A. Dyer, 6 "

The affidavit further shows that the affiant is informed by four persons, that they cast votes, at said election, for J. A. Dyer, and by one person, that he cast his vote for

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(b) See *People v. Cicott*, 16 Mich., 283.

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*The People v. Tisdale.*

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Jas. A. Dyer, for said office of sheriff, and that they intended thereby to vote for said James A. Dyer.

Deponent further says, that he has long been a resident of Jackson county, and is generally acquainted with the inhabitants thereof, and that he does not know but one person, other than the deponent, by the name of Dyer, in said county; that he is the brother of the deponent, and that his name is Milo E. Dyer.

The deponent further states his belief that the vote cast for Jas. A. Dyer, and the four votes for J. A. Dyer, were intended to be cast for the deponent, and that, had they been counted for James A. Dyer, he, the deponent, would have been declared duly elected by a majority of the votes, to said office of sheriff.

In applications of this nature, the court has discretion to grant the leave asked, or to refuse it. When, upon the case made by the affidavits, it appears that the judgment of the court in the case would be unavailing, the court will refuse the motion: *Commonwealth v. Athearn*, 8 Mass. R., 285; *The People v. Sweeting*, 2 Johns. R., 184. So if, upon examination of the affidavits, it should appear that upon the facts stated, the court would not, upon legal principles, interfere in the matter, it would of course be improper to grant leave to file the information. The relator is supposed to have exhibited his whole case in its most favorable aspect, and the court will look to that case, in the exercise of a sound discretion, in granting or refusing the motion.

The case made by the affidavits presents but a single point. If the votes given at the election for Jas. A. Dyer, and those given for J. A. Dyer, or the latter alone, ought to be counted for James A. Dyer, then the latter was duly elected to the office, and the respondent improperly exercises its franchises. The relator does not claim that these votes unexplained should be counted for James A. Dyer;

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*The People v. Tisdale.*

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but he claims that they were in fact given for him, and that he can give testimony to show that such was the intention of the voters by whom they were deposited in the ballot box; that he has long been a resident of that county, and is generally known by the inhabitants thereof; that there is but one other person in the county by the name of Dyer, and that his name is Milo E. Dyer, and that he, deponent, was one of three candidates for the office of sheriff at the election. If such testimony would be admissible, and if produced, would have the effect claimed by the relator, this motion should be granted.

The statute, *R. S.* 1838, *p.* 11, § 4, provides that the voting at the general election of this state "shall be by ballot in writing, on a paper ticket, containing the names of the persons for whom the elector intends to vote, and shall designate the office to which each person so named is intended by him to be chosen;" and further, *R. S.* 1838, *p.* 14, § 8, that "the person having the greatest number of votes shall be deemed to have been elected." After the election the inspectors are required to draw up two statements of the result in writing, "setting forth, in words at full length, the whole number of votes given for each office, the names of the persons for whom such votes for such office were given, and the number of votes so given to each person:" *R. S.* 1838, *p.* 14, § 5. When these returns come before the county canvassers, they are required to make a statement of the same, in which "the whole number of votes given, the names of the candidates, and the number of votes given to each, shall be written in words at full length," and to proceed to determine the persons elected, and to certify their determination: *R. S.* 1838, *p.* 16, §§ 7 and 8.

These statutory provisions designate the acts which shall constitute an election to the office, and the evidence of such election. The voter declares his designation of

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*The People v. Tisdale.*

the individual of his choice, by depositing his ballot in writing on a paper ticket containing the name of the person for whom he intends to give his vote. The law has provided this as the means, and the only means, by which he can effectually give evidence of his choice. The evidence contained in his ballot is made the foundation of the statements to be prepared, both by the inspectors of the election and the county canvassers, and also of the certificate of election issued by the latter. In *The People ex rel. Yates v. Ferguson*, 8 Cow. R., 102, it is said that "the canvassers have no means of examining witnesses, or of receiving any evidence besides what was upon the ballot itself," and in *The People v. Van Slyck*, 4 Cow. R., 297, their duties are expressly declared to be ministerial. "They must ascertain the number of votes given, but they have no right to controvert the votes of the electors." In other words, the vote itself is the only thing which can be received and acted upon as evidence by them. This is, nevertheless, the very tribunal to which the law has committed the determination of the result of an election, and upon whose certificate the elected assumes the duties of the office with the full right to hold until ousted by the mandate of a higher tribunal. We are here to inquire whether, when the question as to the result of an election is presented to this court, testimony of different kind can be admitted.

It is not contended that the votes given for J. A. Dyer can be counted for James A. Dyer, unless evidence is admissible to show that the voters intended them for him. The *name* is required by law to be written upon the ballot. This is not the name of James A. Dyer. It is not the designation by written characters of that individual. The constitution and the statutes having determined who shall be voters, and the manner of exercising that high prerogative, it is difficult to see how a different rule as to

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*The People v. Tisdale.*

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the evidence of the intention of a voter, can obtain on an issue joined in this court, from that which prevails before the canvassers.

It seems to be supposed that, before a jury, on an issue awarded from this court, to try the right to an office, the inquiry will be what was the intention of the voter, by the initials used in his vote. This the relator offers to show by oral testimony. It is a full answer to such claim, to say that the statute has not merely authorized the voter to express his intention by designating an individual for the office, but has required him to do it in a particular manner, to wit, by depositing a ballot with his name written upon it. Any other manner, however fully it should designate the person intended, would be ineffectual. The illiterate voter, who is unable to read a letter upon his ballot, and who is consequently exposed to deception by which he may aid in electing the very candidate he opposes, can express his intention effectually in no other way. The blind man may exercise the right of an elector, but he must do it by a written ballot, though he may have no knowledge of what is written upon it.

The inquiry, before a jury, on the trial of an issue of this character, would not be what the voter intended, but what intention he had expressed in the manner pointed out by statute, to wit, by his written ballot; and this of course would confine the testimony to the ballots themselves, or the proper certificate of the contents. Extraneous testimony of intention would, of course, be rejected before a jury, as well as before the canvassers.

If we were to give a forced construction to the statute, by which extraneous and parol evidence of the intention of the voter, not expressed by his ballot, were to be admitted, I fear we should adopt a principle of most dangerous tendency. Where should the rule find its limits? If, when an initial only is used, the testimony of the voter, as

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The People v. Tisdale.

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to his intention, may give it to one whose name is not expressed by it, why should not the same testimony of intention change a vote given by the voter who cannot read, and finds he has been deceived, and given his ballot for one whom he never intended to support? It is to be feared, too, that such a practice once adopted would open the door to constant litigation, and the frequent commission of the crimes of perjury and subornation of perjury. Such a result, it is true, ought not to be presumed; but we cannot close our eyes to the tendency, in that respect, of the practice sought to be established by the relator.

Upon a view of the whole question, we are all of the opinion that neither the canvassers, nor a jury, on the trial of an issue of fact from this court, to try the respondent's right to the office of sheriff, could go behind the votes given at the ballot boxes, to ascertain the intention of the voters.

We are aware of the decision of this question, in the case of *The People ex rel. Yates v. Ferguson*, by the Supreme Court of the state of New York. The decisions of that highly respectable court are always entitled to great weight; but, in a question presented here for the first time, of great practical importance, we cannot surrender the convictions of our own minds to an authority whose reasoning does not convince us.

Another question is presented upon the admissibility of the vote given for Jas. A. Dyer. The canvassers had the whole votes before them, from which to determine who was elected. They could receive no testimony of intention of the voters, but were to ascertain that intention from the votes. We would not say that a slight error, in the spelling of a name, for instance, should prevent the vote from being counted for the person for whom it was evidently intended. So we can see no reason why a well known abbreviation, as Geo. for George, Thos. for Thomas,

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*The People v. Tidale.*

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should not be used and counted according to the evident intention of the voter. All writing consists of mere arbitrary signs; and, where the signs, used fully, and according to the common use of an entire community, express the name of the individual, it is sufficient. The abbreviations above mentioned, fully, and to the common understanding of all, as arbitrary signs, express the names thereby intended; and so do the letters which constitute the full name. In such case there is no need of going into extrinsic testimony, in order to ascertain the intention of the voter. The name is upon the vote, written in a manner sanctioned by common usage, and understood by all, to mean the name of the person intended and no other. The acceptance or rejection of the vote for Jas. A. Dyer, does not, however, change the result of the election; and, whether it was properly or improperly rejected in the count of votes for James A. Dyer, it can be no cause for entertaining the information.

When a person intrudes himself into an office, in consequence of an unlawful decision of a board of canvassers, the remedy here sought is proper. But, from the view which we here take of the subject, we are satisfied that there was no error, affecting the rights of Dyer, in the canvassing of the votes; and that so far as the question here presented is concerned, the same rule of evidence must apply before a jury impaneled to try the respondent's right to the office, that obtained before that board. We are, therefore, of opinion that the motion for leave to file an information should be denied.

*Motion denied.*

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Taylor v. Kneeland.

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Orestes Taylor v. Lorenzo P. Kneeland.

A count in slander, alleging that the defendant uttered and published that the plaintiff, who was postmaster at F., embezzled certain papers, is not supported by proof that he said *he had no doubt but that the papers were embezzled at F.*, or that *he thought the papers were embezzled at the post-office at F.*

A declaration in slander contained the usual inducement, without the averment of any extrinsic facts or circumstances, showing the actionable quality of the words spoken, except that the plaintiff was postmaster at F., and the third count charged the defendant with having spoken and published, of and concerning the plaintiff, as postmaster, etc., that "*he did not think Marcelli's resignation or his petition had gone to Washington, he had no doubt they were embezzled at F.*" adding, by innuendo, "at the post-office at F. of which the plaintiff was postmaster," meaning and intending thereby, that the plaintiff had delayed and prevented the transmission of the said resignation and petition, to the postmaster-general at Washington," etc. Held, that the count was fatally defective, the words charged to have been spoken and published not appearing to be actionable.

The words were not actionable *per se*, nor were they made so by the averment that the plaintiff was postmaster at F., since, if true, the charge they contained, would not subject the plaintiff to an indictment for a crime involving moral turpitude, or to an infamous punishment. They would, however, have become actionable, had the inducement of the declaration further averred, that the letters or papers referred to, were placed in the post-office at F., or intrusted to the care of the defendant as postmaster at F., or were passed through the said post-office, to their place of destination, since the embezzlement, by the defendant, of papers which so came into his possession, is made criminal, and punishable by fine or imprisonment by an act of congress.

Extrinsic facts or circumstances showing the actionable quality of words, not actionable *per se*, must be directly averred in the *inducement* of the declaration.

The office of an *innuendo*, is merely to apply the different parts of the charge contained in the words, to the different facts before averred in the inducement. Its truth must always appear from precedent averments, and must be supported by the *inducement* and *collatum*.

The omission of any averment, in a count in slander, that the defendant *maliciously* published the matter alleged, is cured by verdict, although it would be fatal on special demurrer.

Words spoken by the defendant, after the commencement of the suit, are not admissible.

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*Taylor v. Kneeland.*

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sible in evidence, to show malice, in an action of slander, unless they expressly refer to those which are the subject matter of the action, and do not constitute a distinct calumny for which the plaintiff would have a separate right of action. (a)

Error to the Oakland Circuit Court. This was an action of slander tried before Hon. CHAS. W. WHIPPLE, presiding judge. The facts fully appear in the opinion of the court.

*Geo. W. Wisner*, for plaintiff in error.

*J. B. Hunt* and *S. G. Watson*, for defendant in error.

**MORELL, C. J.**, delivered the opinion of the court.

This is an action of slander brought by the defendant in error, against the plaintiff in error, for slanderous words alleged to have been spoken by the defendant below in relation to the conduct and behavior of the plaintiff below, in the discharge and exercise of his office of postmaster. The declaration contains the common inducement, without averring any extrinsic matter or circumstances, showing the actionable quality of the words, except averring that the plaintiff was postmaster at Farmington, etc. It then alleges that the "said Orestes Taylor, well knowing the premises, and contriving, etc., heretofore, to wit, on the first day of January, 1840, at Farmington, in the county of Oakland, in a certain discourse which the said Orestes then and there had with one George Brownell, and divers other citizens of this state, uttered and published, of and concerning the said Lorenzo P. Kneeland, and of and concerning his conduct and behavior in the discharge and exercise of his office of postmaster, in the presence and hearing of the said last mentioned citizens, these false, scandalous, malicious and defamatory words, that is to say" (innuendoes omitted), "Corruption is the order of the day. I do not believe Marlatt's resignation as postmaster, and the petition for me, ever reached Washington. Kneel-

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(a) See *Thompson v. Bowers*, *post*, p. 322, note d.

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Taylor v. Kneeland.

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land embezzled those papers; I have no doubt the papers were embezzled at Farmington; he could easily find out that those were the right ones. It was easy enough done; there would be no difficulty in his finding out. He embez-zles letters. He steals letters. He breaks open letters.

The second count charges Taylor with having *spoken and published*, of and concerning the said Kneeland, as such postmaster, these false, scandalous, malicious and defamatory words: To the inquiry, "Do you think that Kneeland embezzled those papers?" He replied: "I have no doubt the papers were embezzled at Farmington." And to the inquiry, "How could Kneeland know those papers from others directed to Washington?" He replied, "He could easy find out. It was easy enough done. There would be no difficulty in his finding out."

The third count charges the defendant with having spoken and published the following words: "He did not think Marlatt's resignation, or his petition, had gone to Washington. He had no doubt but they were embezzled at Farmington.

It appears from the bill of exceptions taken in this cause, that the plaintiff below, after having proved that he was a postmaster in the town of Farmington, called George Brownell as a witness, who testified that he had a conve-sation with the defendant soon after he, the witness, had been appointed postmaster in that part of the town. The defendant said, in respect to his petition, that he did not think it had gone to Washington; that the petition and resignation went on together, and he did not think either of them had gone to Washington. Neither Marlatt's resig-nation, nor his petition, had gone as directed. Witness replied, he thought it must have gone, or that the other appoint-ments would not have been made. Defendant replied, he did not think the papers had gone far. Witness said he did not know how any one could find it out. Defendant

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*Taylor v. Kneeland.*

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said it was easy enough to find that out : "I have no doubt but that the papers were embezzled at Farmington." Witness told defendant he thought he was making a serious charge, and asked him if he thought Kneeland had taken the papers. The witness did not recollect that he mentioned Kneeland's name, but said he thought the papers were embezzled at the post-office at Farmington. That, on the same day, and in the course of an hour or two afterwards, witness had another conversation with the defendant, in which he asked the defendant if he really believed said papers were stopped at the post-office at Farmington." The defendant said he had no doubt of it.

Charles Brownell, a witness called by the plaintiff, testified that he heard defendant say, "he had no kind of doubt but that Marlatt's resignation and his petition, were embezzled at Farmington," and thinks he said "embezzled at the post-office at Farmington."

The plaintiff then called a witness to prove slanderous words uttered after the commencement of the suit, in aggravation of damages. The defendant objected to the introduction of this testimony, which objection was overruled by the court, and the testimony admitted. To this decision the defendant excepted.

The plaintiff having closed his case, the defendant moved for a nonsuit, alleging as reasons,

1. The words proved were not actionable *per se*, and, as the declaration contained no *colloquium*, showing that there had been a petition placed in the post-office at Farmington, and no prefatory statement of any particular subject matter to which the alleged slanderous words referred, the plaintiff, under the testimony adduced, could not sustain his action.

2. A part of the words alleged in the declaration were not actionable, without an averment, and proof, of special damage; and, although *that part of the words* alleged might

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Taylor v. Kneeland.

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be proved, yet the plaintiff could not sustain his case without proving particularly, *that part of the words alleged which were actionable per se.*

3. There was a variance between the *words proved*, and the actionable words alleged in the declaration.

The court overruled the motion for nonsuit. To this also the defendant excepted.

The testimony being closed, the defendant asked the court to charge the jury:

1. That a part of the words charged in the declaration were not actionable.

2. If there was a variance between the *words proved* and that part of the words charged which was actionable, they must find for the defendant.

The court refused so to charge the jury, and they found a general verdict for the plaintiff, for twenty dollars.

The defendant then moved to arrest the judgment, for reasons appearing upon the record. The court overruled the motion, and to all these decisions the defendant excepted.

There is a number of grounds of error assigned, some arising *dehors* the record, and some upon the record itself. But it will not be necessary to examine all of them, in order to arrive at a correct decision.

I shall first examine whether there was a variance between the *words proved*, and that part of the words charged which were actionable *per se*; and whether the court erred in refusing so to charge the jury. The first count charges the defendant with having spoken these words: "Corruption is the order of the day. I do not believe Marlatt's resignation as postmaster, and the petition for me, ever reached Washington. Kneeland embezzled those papers. I have no doubt the papers were embezzled at Farmington," etc. "He embezzles letters. He steals letters. He breaks open letters."

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*Taylor v. Kneeland.*

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Now, the proof does not sustain this count; for, although I am willing to admit, that "corruption is the order of the day," and that the court below viewed this charge as one of those self-evident propositions which require no proof to sustain them, still, it nowhere appears that the defendant ever made the declaration, neither does it appear, that he ever charged Kneeland with embezzling those papers. There was, then, a variance between the proof and the charge in the first count; so there is in respect to the second count.

But the words as charged in the third count, are substantially proved. The question then arises upon the record, whether these words are actionable *per se*, or whether they can be made so by reference to any other part of the record.

*Johnson* and *Walker* define the word embezzle, to mean, "to appropriate by breach of trust;" and *Webster* defines it, "to appropriate fraudulently to one's own use what is intrusted to one's care and management." It differs from stealing and robbery in this, that the latter imply a wrongful taking of another's goods, but embezzlement denotes the wrongful appropriation and use of what came into possession rightfully. And so it has been held, that words charging a person with the embezzlement of goods, are not actionable: *Stark. on Sl.*, 13, n. 6; because the charge, if true, will not subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment: *5 Johns. R.*, 188, 191.

But, although these words are not actionable, when spoken in relation to a private citizen, still, they may become so, by virtue of certain statutory provisions, when spoken of a public officer. The *Post-office Laws U.S.*, p. 12, § 21, enact, "that, if any person employed in any of the departments of the post-office establishment, shall unlawfully

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*Taylor v. Kneeland.*

detain, delay, or open, any letter, packet, bag, or mail of letters, with which he shall be intrusted, or which shall come to his possession, and which are intended to be conveyed by post; or, if such person shall secrete, embezzle, or destroy any letter or packet intrusted to such person as aforesaid, and which shall not contain any security for, or assurance relating to, money, every such offender being thereof duly convicted, shall, for every such offense, be fined not exceeding \$300, or imprisoned not exceeding six months, or both, according to the circumstances and aggravation of the offense."

The third count charges the defendant with having spoken and published, of and concerning the plaintiff as postmaster, etc., the following words: "He did not think Marlatt's resignation, or his petition, had gone to Washington. He had no doubt they were embezzled at Farmington, *innuendo* (at the post-office at Farmington, of which the said Lorenzo P. Kneeland was postmaster, meaning), and meaning and intending thereby, that the said Lorenzo P. Kneeland had delayed, and prevented the transmission of the said resignation and petition, to the postmaster-general at Washington, for the purpose of defeating the appointment of the said Orestes Taylor as postmaster, and that the said Lorenzo P. Kneeland had, corruptly, and against his duty as postmaster, conveyed, disposed of, and embezzled the said letters and papers, placed in said office, or passing through said office, to their place of destination."

Has the plaintiff alleged anything in the inducement to warrant this *innuendo*? Here the actionable quality of the words arises from *extrinsic* circumstances, and, STARKIE says, those circumstances must appear, and that the method of putting them upon record is: 1. By an introductory part, or inducement, and stating them by averment. 2. By a *colloquium*, connecting them with the

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*Taylor v. Kneeland.*

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libel, or slander, as by saying that the words were spoken "of and concerning," the extrinsic facts so averred in the inducement. 3. By an innuendo, applying the different parts of the charge to the different facts before averred and set forth in the inducement: *Stark. on Sl.*, 290.

The innuendo, therefore, can do nothing more than refer back to some facts stated in the inducement. For, the truth of an innuendo must always appear from precedent averments: 7 *Johns. R.*, 272; and the inducement and *colloquium* must warrant the innuendo. Now, there is no averment in the inducement, that any letters or papers referred to in the innuendo, were ever placed in the post-office at Farmington, or intrusted to the care of the post-master at Farmington, or that they ever passed through said office to their place of destination, and without such averment, there is nothing to sustain the innuendo. The declaration is, therefore, bad; for the offense, as charged, is not actionable.

There are other exceptions taken, which, although not necessary to be examined in deciding this case, it may be deemed advisable to notice.

One ground is, that there is no averment that the defendant *maliciously* published the matter. This objection would be good on special demurrer, but is cured by verdict: *Stark. on Sl.*, 433; 1 *East. R.*, 563; 1 *Saund. R.*, 242, a.

Another objection is, that the court admitted evidence to prove slanderous words uttered after the commencement of the suit, in aggravation of damages.

What the words offered to be proved were, does not appear from the bill of exceptions. STARKIE lays down this general proposition, that "for the purpose of proving malice, it seems that any acts or words used by the defendant, tending to prove a malignant and malicious intention towards the plaintiff, are admissible in evidence, although the words so given in evidence be in themselves action-

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Taylor v. Kneeland.

able, and are not specified in the declaration, and although they were spoken subsequently to the words declared upon :" 2 Stark. Ev., 465.

Although Starkie lays down the doctrine in these general terms, still he is not supported by the cases which he cites to sustain it, and it must be taken with certain limitations and restrictions. Thus it is said, that after proving the words laid in the declaration, the plaintiff may give in evidence other words not actionable, to show malice in the defendant: *Wallis v. Mease*, 3 *Binn. R.*, 550; *Eccles v. Schackelford*, 1 *Litt. R.*, 35. Also, actionable words spoken after the suit brought: 3 *Binn R.*, 550; *Kean v. McLaughlin*, 2 *Serg. & Rawle R.*, 469; *Shock v. McChesney*, 2 *Yeates R.*, 473. So, the plaintiff may give in evidence the speaking by the defendant of the same words after the suit brought: *Miller v. Kerr*, 2 *McCord R.*, 285.

In *Thomas v. Croswell*, 7 *Johns R.*, 264, SPENCER, C. J., says: " It is improper to suffer distinct libelous matter, subsequent to that charged in the declaration, to be given in evidence, to show the intent with which the matter charged was published. And, in Tennessee, evidence of words spoken after suit brought, is not admissible: *secus* as to words spoken before, though not declared on: *Howell v. Cheatham, Cooke's R.*, 248. But the Supreme Court of Massachusetts, in a late case, after remarking that it was a difficult question, adopted the rule laid down by PHILLIPS, 2 *Phil. Ev.*, 247, *Cow. & Hill's ed.*, "that the subsequent words or libels offered in evidence, did expressly refer to those which were the subject of the action," and that, therefore, a distinct calumny for which the party had a right of action, was inadmissible: *Bodwell v. Swan*, 3 *Pick. R.*, 376. And this is in accordance with the doctrine laid down by C. J. MANSFIELD, that a repetition of the same words, or the same libel, may be proved to show

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*Taylor v. Kneeland.*

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that the first was not heedless, but malicious. "And we think so far we may go; but we cannot agree, that, if a man sue another for calling him a thief, he may prove that at another time afterwards he also called him a murderer. This is a distinct calumny, for which the plaintiff has a right to his action, and although it may serve to prove malice as to the first words, so also, it will necessarily go to enhance the damages; for no jury can show how much or how little damages were given on account of his second charge :" 3 *Pick. R.*, 376.

I think, therefore, that the most reasonable rule which can be adopted, is that laid down in Phillips, and adopted in Massachusetts, that the subsequent words or libels offered in evidence, should expressly refer to those which were the subject of the action, and that a distinct calumny, for which the party would have a right of action, would be inadmissible.

Whether the slanderous words, which were uttered in this case after the commencement of the suit, and which were given in evidence, came within this rule, we cannot say, as the words are not set out in the bill of exceptions.

WHIPPLE, J., having presided on the trial of the cause in the court below, did not participate in the decision.

*Judgment reversed and nonsuit ordered.*

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*Stevens v. Townsend.*

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**Benjamin Stevens, Jr., and Jacob Corlies, Appellees, v.  
Zebulon Townsend, Appellant.**

This court will not dismiss an appeal from a decree of the Court of Chancery, on motion of the appellees, on the ground that the appellant, having made default in the court below, had no right of appeal, unless the decree recite all those facts, which, by the rules and practice of the Court of Chancery, entitle a party to default his adversary.

The decree of the Court of Chancery appealed from in this cause, recited that the 'cause having been heretofore brought on to be heard and decided, upon the agreement and stipulation of the said Townsend, and the complainants, and the answer of the said Townsend, and upon exhibits read by stipulation and consent, and the said bill having been taken as confessed against the said Colby and the said Bum-pus' (co-defendants with Townsend), "and upon hearing Mr. Lane and Mr. Buckbee, of counsel for the complainants, and no person appearing to argue the said cause on the part of the defendants, and due deliberation being thereupon had," etc. *Held*, That it did not show such a default of the defendant, the appellant, and abandonment of his cause in the court below, as would deprive him of the right of appeal to this court.

The court decline expressing any opinion, in this case, as to whether there are any, and if any, what restrictions upon the right of appeal to this court, from the Court of Chancery, conferred by the statute—R. S. 1838, p. 879, § 121—(a) but infer from a review of cases decided by the Court of Errors in New York, touching the right of appeal to that court, where the appellant has made default in the court below: 1. That the restrictions upon the general right of appeal to that court, result *principally* from that provision of the constitution of New York, which makes it imperative upon the chancellor, and upon the judges of the Supreme Court, to inform the Court of Errors of the reasons of their judgments; and, 2. That if the error alleged, in the appellate court, could not have been obviated in the court below, by proof or amendment, had objection been there made, the appeal will be sustained.

The statute—R. S. 1838, p. 880, § 127—(b) is not *mandatory*, but merely *authorizes* the chancellor to sit with the justices of the Supreme Court, and inform them of the reasons of his decree or order, on the hearing of an appeal therefrom to the Supreme Court.

**Appeal from the Court of Chancery.** A motion was made by the appellees, to dismiss the appeal on the ground that the appellant had made default in the court

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(a) Similar provision, C. L. 1871, § 5179.

(b) Repealed.

*Stevens v. Townsend.*

below, by failing to appear and argue the cause at the hearing whereupon the decree had been entered, and that, therefore, no appeal would lie from such decree to this court. The facts fully appear in the opinion of the court.

C. W. LANE, in support of the motion, contended that the equity jurisdiction of this court was appellate only: *R. S.* 362, § 3; *Id.*, 379, §§ 120, 121; *Id.*, 359, § 7; *Id.*, 358, § 8; *Id.*, 379, § 125; and, that the decree in this case, having been entered by default, under rules prescribed by the chancellor, rule 69; 1 *Hoff. Ch. Pr.*, 557; and expressly authorized by statute, cannot be appealed from: 2 *R. S.*, *N. Y.*, 167, § 27, compared with *R. S.*, 379, § 125; *Kane v. Whittick*, 8 *Wend. R.*, 219; opinions of SUTHERLAND, J., and of BEARDSLEY and MAYNARD, Senators. *Hildreth v. Sands*, 12 *Johns. R.*, 494; *Travis v. Waters*, 12 *Johns. R.*, 511; *Gelston v. Hoyt*, 13 *Johns. R.*, 575; *Henry v. Cuyler*, 17 *Johns. R.*, 471; *Colden v. Knickerbacker*, 2 *Cow. R.*, 49; *Campbell v. Stokes*, 2 *Wend. R.*, 137; *Houghton v. Starr*, 4 *Wend. R.*, 179, showing the rule adopted by the Court of Errors in New York; and also, *Dean v. Abel*, 1 *Dick. R.*, 282; 2 *Sch. & Lef.*, 689, 712; 2 *Doucl. R.*, 72; 4 *Bridg. Eq. Dig.*, 51, §§ 55, 57; *Id.*, 52, § 69; *Seat. F. Ch.*, 386, showing the rule adopted in the English house of lords. So entirely do courts of appellate jurisdiction carry out the principle, that their authority is only to review and correct the deliberate decisions of the inferior courts, that they will not permit a point to be made which was not made in the court below: *Frankland v. McGarty*, 1 *Knapp*, 274; 2 *Sch. & Lef.*, 712; *Beekman v. Frost*, 18 *Johns.*, 558; 13 *Johns.*, 562; *Barnes v. Lee*, 1 *Bibb*, 526; 3 *Am. Eq. Dig.*, 179, § 8.

W.M. A. FLETCHER, *contra*, insisted: *First*, That there was no default of the appellant on the hearing in the court below. 1. There was no proper proof of the fact. This

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Stevens v. Townsend.

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should have been shown by the decree, which should have recited every fact going to constitute the default: *Sands v. Hildreth*, 12 Johns. R., 493-4. Nothing can be presumed. 2. The default insisted upon, is no default by the rules and practice of the court below: *Rules 67 and 69, of the Court of Ch.* There is no rule requiring the party to argue the cause. He may submit it upon the papers. 3. The cause was argued on the part of the appellant at the term preceding that in which the default is alleged to have been made. The hearing in July was a continuation of the former hearing, and, therefore, there could have been no default at the second hearing: *Bea. Ord. in Ch.*, 198; 4 *Bridg. Dig.*, 282; *Halsey v. Smith*, 1 Mis. R., 186; *Veneman v. Veneman*, 1 *Dick. R.*, 93. 4. If the second hearing had no such connection with the first, then the cause was not regularly brought on for a hearing at the July term, and, therefore, the appellant could not be in default. The notices required by *Rules 65 and 62*, were not given. That the notice required by *Rule 65*, was given, should appear by the decree: 12 Johns. R., 494.

*Secondly.* The cause was presented to and decided by the court upon the merits, and the decree was thereupon made, and not of course. This appears by the decree itself and by other circumstances.

*Thirdly.* If the merits of the case had not been presented to, and passed upon by the court below, yet the appellant is entitled to his appeal, because the objection now made to the decree as a ground of error, could not have been obviated in the court below, by proof or amendment, had it been made in that court. This proposition is fully sustained by the cases cited by the counsel for the appellees, from the Court of Errors in New York in support of this motion, and by *Palmer v. Lorillard*, 16 Johns. R., 348, and by *Beekman v. Frost*, 18 Johns. R., 544, 558.

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*Stevens v. Townsend.*

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*Fourthly.* The appellate jurisdiction of the Court of Errors in New York, and the house of lords in England, are peculiar, and the rules and practice which have been adopted in those courts in respect to the right of appeal, are not applicable here. The appellate jurisdiction of the house of lords was not created, defined, or regulated by any written law. 3 *Bl. Com.*, 39, 40, 57. Its practice upon appeals has been adopted from considerations of expediency, or from accident, or ancient usage. It differs from that of courts proceeding according to the course of the civil law, from which appeals are derived, and by which, an appeal stands in the appellate court for a re-trial upon the whole merits of the cause, as well as to matters of fact, as of law, and the whole cause is tried without any reference to the evidence given below, or the law which was there applied to the case: 3 *Dall.*, 327; 14 *Mass. R.*, 420; 7 *Pick.*, 303. The restrictions upon the right of appeal to the house of lords, are unknown in courts of appellate jurisdiction proceeding according to the course of the civil law. As to the Court of Errors, its jurisdiction was modeled after that of the house of lords: 2 *Hoff. Ch. Pr.*, 14; and the principal reason which it has assigned, for the restrictions it has imposed upon the right of appeal, is derived from that provision of the constitution of New York, which makes it *imperative* upon the chancellor and judges of the Supreme Court, to assign their reasons, before the Court of Errors, for their respective decisions, and the statute making it the imperative duty of that court to require those reasons: 12 *Johns.*, 493; 13 *Id.*, 561; 17 *Id.*, 469; 2 *Cow.*, 31; 4 *Wend.*, 138. The origin and design of the appellate jurisdiction of this court, is entirely different from that of either the house of lords or Court of Errors. There is nothing peculiar in the general character and powers of this court as the Supreme Court of law, nor in the object of giving an appeal

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Stevens v. Townsend.

which requires or authorizes a departure in its proceedings, on appeals from chancery, from the proceedings in courts of general appellate jurisdiction according to the civil law.

When an appeal is given by our statute, it is intended and understood to be governed by the rules of the civil law, unless modified by the statute: *7 Pick.*, 303. The several appeals given by our statutes have in practice been so regarded, as appeals from the county courts to the Supreme Court of the late territory, appeals from justices' courts to the Circuit Courts, and from the Probate Courts to this court. The right of appeal given by our statute from the Court of Chancery, and the powers and duties of this court upon such appeal, are full and explicit, and leave no room for such a construction as is contended for by the appellees.

WHIPPLE, J., delivered the opinion of the court.

Upon the entry of the appeal in this cause, by the appellant, a motion was made by the appellees to dismiss the same for the want of jurisdiction. The principal ground urged by the counsel in support of the motion, is, that the decree having been entered by default, under rules prescribed by the chancellor, and expressly authorized by the statute, cannot be the subject of an appeal to this court.

It appears from the record, that the bill was filed against William L. Colby, Samuel B. Bumpus and the appellant, and was what is generally termed, a creditor's bill, and also, a bill to set aside conveyances of certain lands made by Colby to Bumpus, and by Bumpus to Townsend, in fraud of the rights of the creditors of Colby. Bumpus and Colby failed to appear and defend, and as to them the bill was taken *pro confesso*. Townsend, however, did appear and put in an answer. In December, 1841, the

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*Stevens v. Townsend.*

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complainants and Townsend, by their respective solicitors, entered into a stipulation, by which they agreed that the cause should be heard at the January term, 1842, of the Court of Chancery, upon the bill, the answer of Townsend, and certain exhibits specified in the stipulation. At the February term, 1842, of the Court of Chancery, the chancellor made a decree by which the said conveyances were declared to be fraudulent and void, and directed a conveyance of the premises in question, by Colby to the receiver who had been appointed in the cause. The decree is, in part, as follows : " This cause having been heretofore brought on to be heard and decided upon the agreement and stipulation of the said Townsend and the complainants, and the answer of said Townsend, and upon exhibits read by stipulation and consent ; and the said bill having been taken as confessed against said William L. Colby and Samuel B. Bumpus, and upon hearing Mr. Lane and Mr. Buckbee, of counsel for the complainants, and no person appearing to argue said cause on the part of said defendants, and due deliberation being had thereupon," etc.

The right of appeal from the Court of Chancery to this court, is given in these words: " Any person, complainant or defendant, who may think himself aggrieved by the decree or final order of the Court of Chancery, *in any case*, may appeal therefrom to the Supreme Court :" *R. S.*, 379, § 121. Upon the entry of the appeal, the duties and powers of this court are declared, as follows: " Upon any order or decree of the Court of Chancery being brought by appeal to the Supreme Court, that court shall examine all errors that shall be assigned, or *found* in such order or decree, and shall hear and determine such appeal, and all matters concerning the same, and shall have power to reverse, affirm, or alter such order or decree, and to make

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Stevens v. Townsend.

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such other order or decree therein, as justice or equity shall require : " *R. S.*, 879, § 125.

It is further provided, that when an appeal is heard, the chancellor shall be *authorized* to sit with the judges of the Supreme Court, and inform them of the reasons of his decree or order, but shall have no voice in the final sentence : *R. S.*, 380, § 127.

It is proper here to state that, upon the argument of this motion, certain affidavits were read to show that the case was argued upon the merits at the January term, 1842, of the Court of Chancery, and submitted for decision, agreeably to the terms of the stipulation ; and that the chancellor before whom the argument was had, resigned his office in the month of April following, without pronouncing an opinion ; that, at the July term following, the present chancellor, upon the suggestion of the complainant's solicitor, ordered the cause to be docketed and set down for argument, although this course was resisted by the solicitor of the defendants, on the ground that the cause was not regularly set down for a hearing by the complainant, and four days' notice of that fact given to the opposite solicitor, pursuant to the rules and practice of the court. It further appears that, at the hearing, the bill, answer and exhibits were read, and that the chancellor, in expressing his opinion, stated that it was founded chiefly upon the views of the late chancellor, which had been communicated to him. The register of the court has also certified that the cause was not docketed at the July term for a hearing, until after its session commenced, no notice having been given, or request made, for that purpose, and that he neglected to make an entry in the journal of the hearing of the cause at the preceding January term, pursuant to the stipulation.

With this statement of the facts upon which the motion is based, and the provisions of the statute applicable

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Stevens v. Townsend.

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thereto, I shall now proceed to its consideration. In support of the motion numerous authorities have been cited, both from England and New York, showing the rule which prevails in the house of lords, and in the Court of Errors, upon the subject of appeals from chancery, and it is not a little remarkable that the counsel for the respective parties have each referred to many of the same authorities to support directly opposite principles. A critical review of these cases will not fail to show that they might, with great propriety, be cited by counsel on both sides, exhibiting, as they do, a remarkable instance of the facility with which the decisions of that anomalous tribunal—the Court of Errors—may be accommodated to particular cases as they arise, and how easily the principles established by that high court, at one period, may be overthrown by the same court at another; and especially, how readily the reasoning in support of a principle by one judge, may be disposed of by his successors.

The first case in New York in which the question of the jurisdiction of the Court of Errors in appeals from chancery, arose, was that of *Robert Sands v. Hildreth*, 12 Johns. R., 493. Hildreth filed his bill against Robert Sands, Comfort Sands and Amie J. Barbarine. The bill was taken as confessed against Comfort Sands, for want of answer, and as to Barbarine, the cause stood on the bill and answer. An answer of Robert Sands was also filed and a replication thereto; and witnesses were examined on the part of Hildreth; but none on the part of the appellants. The cause was regularly set down for a hearing, when the defendants all made default, no person appearing on behalf of either of them; upon which a decree was pronounced by the chancellor. The decree recited particularly the fact that the cause was regularly set down for a hearing, and that no person appeared for the appellants.

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Stevens v. Townsend.

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The cause having been appealed, a motion was made by the appellee to dismiss: 1. On the ground that the defendants did not appear in the court below to defend the suit; 2. Because the Court of Errors would be obliged to decide without having the reasons of the chancellor; 3. Because it would be making the Court of Errors a court of original jurisdiction; and, 4. Because no matter not insisted upon in the court below, can be made the ground of appeal. The case of *Dean v. Abel*, 1 *Dick.*, 282, was referred to as a decision by the house of lords sustaining the proposition that where default was made at the hearing, the court would not go into the merits, but dismiss the appeal. The motion to dismiss was resisted by the counsel of the appellant, upon the ground that an appeal was clearly and explicitly given by the statute, and that, therefore, the English authorities were inapplicable; and further, that the chancellor was bound to examine every case that might come before him, before pronouncing a decree. The motion to dismiss prevailed, and as this appears to have been the first case that arose, involving the right of a party to appeal where a default was made below, it is to be regretted that no reasons were given for granting the motion.

The next case which brought this question before the Court of Errors, is that of *Gelston v. Hoyt*, 13 *Johns. R.*, 561. The case was brought before the Court of Errors by writ of error to the Supreme Court. The plaintiff below demurred to special pleas filed by the defendant, and the defendant's counsel declined arguing the demurrer when it was called up for argument; whereupon, judgment on the demurrer was rendered in favor of the plaintiff as of course. One of the errors assigned was, that the matters contained in the special pleas, amounted in law to a justification, and that the judgment on the demurrer ought to have been in favor of those pleas. It was insisted

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*Stevens v. Townsend.*

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by the counsel for the defendant in error, that, inasmuch as the plaintiffs in error did not choose to argue the demurrer in the Supreme Court, they ought to be precluded from raising any question upon it in the Court of Errors; for, if such a course was sanctioned, it would have the effect of depriving the plaintiff below of the benefit of the permission which the Supreme Court would have granted him, of withdrawing his demurrer and replying to the pleas. The chancellor, in delivering his opinion upon this point, remarks: "That the judges of the Supreme Court have not assigned reasons for the judgment which they pronounced on the demurrer, because, as was stated by Mr. Justice SPENCER, in behalf of the court, when the cause was called" (meaning the issue joined on the demurrer), "the defendant's counsel appeared and declined to argue." The chancellor then proceeds to discuss the question raised, and sustained the objection made by the defendants in error, upon the following grounds: 1. Because, such a course of proceeding would be unfair, inasmuch as "it takes from the party demurring an advantage which he would have been entitled to in the Supreme Court, if the inclination of that court had been against him, of withdrawing his demurrer, and replying to the pleas;" and that "a party acts against good conscience, if he will not come forward and disclose his reasons, when called upon by the proper tribunal, but reserves himself for another court, and for the cold, hard purpose of accumulating costs, or of depriving his adversary of the opportunity of correcting his error." 2. Because the point was within the reason of the decision of the court in the case of *Sands v. Hildreth*; and he suggests that the appeal, in that case, was dismissed because the appellant failed to appear after the cause had been regularly set down for a hearing, on due notice. 3. Because "the theory and constitution of a court of appellate jurisdic-

*Stevens v. Townsend.*

tion only, is the correction of errors which a court below may have committed, and a court below cannot be said to have committed an error when their judgment was never called into exercise, and the point of law was never taken into consideration, but was abandoned by the acquiescence or default of the party who raised it;" and that, to consider "questions of law which the party would not discuss in the Supreme Court, and which that court, therefore, did not consider, would be in effect, to assume original jurisdiction." 4. "Because," said the chancellor, "a still more decisive objection to our taking into consideration a question on demurrer in the court below, and there refused to be argued, is to be drawn from the constitution which provides for the institution of this court. It declares that, "if a cause shall be brought up by writ of error in a question of law on a judgment in the Supreme Court, the judges of the court shall assign the reasons of such, their judgment." The inference which the chancellor deduces from this provision of the constitution of New York, is, that "in a case in which the opinion of the Supreme Court was never required, or taken, no reasons can be assigned, and it is not a case for a writ of error within the purview of the constitution." And then adds, that the Court of Errors "are entitled, *as of right*, to the aid of those reasons."

The next case referred to in argument is *Palmer v. Lorillard*, 16 Johns. R., 348, decided also by the Court of Errors. It would seem that the action below was in *assumpsit*, and that the facts found by a special verdict, entitled the plaintiff to a judgment in trover; the court, without adverting to the form of the action, gave judgment for the plaintiff. In the discussion of this point, the chancellor remarked "that the attention of the Supreme Court was never called to the application of the finding of the jury to the charge; and probably the declaration

*Stevens v. Townsend.*

was never presented to them; if it had been, it would have been impossible for them to have rendered a judgment for the plaintiffs, because the verdict destroyed the cause of action." He then proceeds to say that the case did not come within the rule that an objection not taken in the court below, could not be taken in the Court of Errors; "that the rule was only intended to be applied to objections that the party may be deemed, by his silence, to have waived, and which, when waived, still leave the merits of the case to rest with the judgment." "But," continues the chancellor, "if the foundation of the action has manifestly failed, we cannot, without shocking the common sense of justice, allow a recovery to stand." Such, then, was the opinion in this case of the Chancellor and of the Court of Errors upon this vexed question, and after giving to it the most deliberate and careful consideration, I am unable to reconcile it with the views expressed by that learned judge in the case of *Gelston v. Hoyt*. Does not the reasoning he adopted in that case apply with equal force to that of *Palmer v. Lorillard*? Was it not competent for the plaintiff in error to have brought the question raised in the Court of Errors to the attention of the Supreme Court? The error complained of was too palpable to have escaped the notice of counsel, and the inference cannot be resisted, that the failure to direct the attention of the Supreme Court to the discrepancy between the declaration and the verdict, was intentional; and the attempt on the part of the plaintiff in error to avail himself of an objection of that nature in the court above, subjects him to the imputation cast upon such a course of procedure, in the first objection stated by the chancellor in the case of *Gelston v. Hoyt*. But it is still more difficult to reconcile the decisions in these cases, if the learned chancellor meant what his language obviously imports he did mean, in the fourth objection which has

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Stevens v. Townsend.

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already been quoted. It is there stated as decisive of the question, "that in a case in which the opinion of the Supreme Court was never required, or taken, no reasons can be assigned, and it is not a case for a writ of error within the purview of the constitution." Can language be more plain? And was not the principal reason for refusing to entertain jurisdiction of the question raised by counsel in the case of *Gelston v. Hoyt*, founded upon the fact that the constitution prohibited the Court of Errors from considering any question which was not presented for the decision of the Supreme Court? If, in that case, it was unconstitutional, it was equally so in the case of *Palmer v. Lorillard*, and there is a conflict of decision.

The principle, then, to be gathered from this decision is, that if in any case which may come before the Court of Errors, either upon writ of error or appeal, it appears "that the foundation of the action below manifestly failed, the Court of Errors could not, without shocking the common sense of justice, permit the recovery to stand."

Next in order of time is the case of *Henry v. Cuyler et ux.*, 17 Johns. R., 469. Cuyler and his wife filed a declaration in covenant against Henry, who demurred; there was a judgment by default for Cuyler and his wife; damages were afterwards assessed, and a final judgment rendered in favor of the plaintiffs below. It further appears that the case took this course by consent of counsel, and for the purpose of obtaining a decision of the Court of Errors upon the construction of the instrument, upon which the action was founded. The counsel for the plaintiff in error having moved to bring on the cause for argument, Mr. Justice VAN NESS said that the question raised in the cause had never been brought before the Supreme Court for its consideration, although it was true that a similar question was decided by that court in the case of *The Corporation of New York v. Cashman*, 10 Johns. R., 96.

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*Stevens v. Townsend.*

He further remarked that no reasons for the judgment could be assigned, judgment below having been entered on a default. The chancellor observed that the Court of Errors could not take notice of a cause which had never been brought before the court below for its consideration and judgment, although they may have solemnly decided a similar question in some other cause. He then referred to the decision of the court in the case of *Sands v. Hildreth*, and of *Gelston v. Hoyt*, in support of the opinion he gave for dismissing the writ of error; and to the views he expressed in the case of *Gelston v. Hoyt*, as containing a full exposition of the reasons for his opinion upon the question under consideration. It will be perceived that the chancellor does not even advert to his opinion in the case of *Palmer v. Lorillard*, decided three years after the case of *Gelston v. Hoyt*, which I have endeavored to show, overthrew the whole foundation upon which his reasoning in the latter case rested. It appears somewhat remarkable, that the chancellor should have passed by the case of *Palmer v. Lorillard*, without even the cold respect of a passing notice; more especially, as it was the last case which brought the question he was then considering, to the attention of the Court of Errors, and in which it was asserted in strong language, that the strict rule laid down in the case of *Gelston v. Hoyt* was not to be so construed as to include cases where the foundation of the action in the court below failed; for such an application of the rule would be shocking the common sense of justice. The conclusion, then, is irresistible, that the Court of Errors, in the case of *Henry v. Cryler*, abandoned the principles established in the case of *Palmer v. Lorillard*, and fell back once more on the old ground maintained in the case of *Gelston v. Hoyt*.

This perplexing question slumbered until 1820, when it was once more revived, in the case of *Beekman v. Frost*,

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Stevens v. Townsend.

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18 *Johns. R.*, 544. The error assigned in the court above was, that the facts stated in the bill gave the respondents no rights as plaintiffs in a Court of Equity. It was objected that this ground was not taken below, nor decided by the chancellor. Chief Justice SPENCER, in delivering the opinion of the court, says: "This question has frequently arisen, and it is necessary that it should be now settled in such a manner, that no further embarrassment may be experienced." This language certainly contains an admission that the question was *unsettled*, although the chief justice intimates that, properly understood, the cases which I have attempted to review are reconcilable. After referring to these cases, he says that, "the principle to be extracted from them, I believe to be this: That no party shall be allowed to surprise or mislead his adversary; thus, if a party in the court below shall purposely suffer a decree or judgment to pass by default against him, without contesting them, he shall not be heard here; or, if counsel shall, for the first time, raise a point here, which might have been obviated, had it been made in the court below, he ought not to be permitted to do so." "But," he continues, "when a cause has been defended in a court below, and comes here for review, and a point is made here, which could not be obviated in the court below, by proof or amendment, I am clearly of opinion that this court ought not to refuse cognizance of such point. We may not, it is true, upon such point, have the reasons of the judgment in the court below; but this consideration cannot, and ought not, to preclude this court from entertaining such point." This decision of the Court of Errors is important, because the case is more analogous to the one before this court, than any other to be met with in New York, in which the present question is involved; and also, because the court repudiate some of the reasoning upon which the opinion in the case of *Gelston v. Hoyt* was

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*Stevens v. Townsend.*

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based, and re-affirm the views expressed in the case of *Palmer v. Lorillard*, and which, it will be recollect, were not noticed by the court in the case of *Henry v. Cuyler*. But the court go further, and lay down the broad proposition, that if a point is made in the Court of Errors, which could not be obviated in the court below, by proof or amendment, they will take cognizance of it, although it was not made below, and notwithstanding the constitutional requirement, that that court should assign the reason for its judgment. In the case of *Knickerbacker v. Colden*, 2 *Cow. R.*, 81, the court dismissed the writ of error, for the reason that the defendant below never appeared or made any defense, and that the Supreme Court might have afforded him all the relief sought for, if an application for that purpose had been made. The points assigned for error were that there existed irregularities in the proceedings below.

The opinion of the Court of Errors upon this question, in the case of *Campbell v. Stokes*, 2 *Wend. R.*, 137, deserves a more extended examination. There were two issues in fact joined in the Supreme Court, and only one of them was passed upon by the jury; and this was assigned for error. It was admitted that no application was made to the Supreme Court, by motion in arrest of judgment or otherwise, to bring the question to the notice of that court. The chancellor, in giving his opinion, says: "There is a manifest distinction to be observed between the proceedings on writs of error in this court, and the proceedings of the Supreme Court on writs of error to inferior tribunals. The Supreme Court are bound to correct errors in the proceedings of inferior tribunals which are brought before them, whether they relate to decisions either actually or nominally made by the court below, or to matters out of the record, usually denominated errors in fact. But in the organization of this court, it was evi-

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Stevens v. Townsend.

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dently the intention of the framers of the constitution, that it should be strictly an appellate court, for the re-examination and correction of decisions actually made by other tribunals, upon questions actually presented to them for their determination." The chancellor then refers to that provision of the constitution requiring the judges of the Supreme Court, on writs of error, to assign the reasons for their judgment, in support of the position thus laid down. Notwithstanding the comprehensive language thus adopted by the chancellor, he admits that the rule has been, and may be departed from, in certain cases, and cites that of *Palmer v. Lorillard*, as belonging to that class. But it is important to notice that the prominent reason, given by the chancellor, in favor of restricting the jurisdiction of the Court of Errors to the examination of questions which were raised and decided in the inferior tribunals, is to be found in the true construction of the constitution of the state. He admits that the Supreme Court, which is not thus trammelled by constitutional restrictions, may consider all questions properly arising upon the record, whether they were considered in the inferior court or not. In the case of *Houghton v. Starr*, 4 *Wend. R.*, 175, the rule laid down in the preceding case was adopted.

The last case from New York upon this question, is *Kane v. Whittick*, 8 *Wend. R.*, 219. After reviewing several of the cases in which the question arose, Mr. Justice SUTHERLAND considers the following points to have been settled: "1. That the Court of Errors have uniformly refused to entertain a writ of error or appeal from a judgment or decree, entered by *default* in the court below, and cites as an only exception, the case of *Cheatham v. Tillotson*, 5 *Johns.*, 430, in which the objection was not raised in the Court of Errors. 2. That the Court of Errors will not permit a point to be made and discussed here, which was

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Stevens v. Townsend.

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not raised in the court below. 3. That in these decisions the court has proceeded on the ground of a want of jurisdiction, as resulting, *first*, from the nature and constitution of a court of appellate jurisdiction merely; and, *secondly*, from that provision of the constitution which declares, "that when an appeal from the decree of a court of equity shall be heard, the chancellor shall inform the court of the reason of his decree," etc. It is worthy of notice that the learned judge, in delivering the opinion of the court in this case, seems entirely to have overlooked the opinion of the chancellor in the case of *Palmer v. Lorillard*, and the opinion of Chief Justice SPENCER in the case of *Beekman v. Frost*, which do not support the second point supposed to have been settled; nor is it supported by the chancellor in the case of *Knickerbacker v. Colden*.

Having now completed the examination of the several cases decided by the Court of Errors in New York, in which the question involved in this case was considered, I think it must be admitted, that it is quite impossible to reconcile those decisions, or the reasoning by which they are supported; and it is equally clear that this want of uniformity arose from the views taken by the Court of Errors in the early decisions; and the correctness of which, to some extent at least, is certainly shaken by the strong reasoning of that court in subsequent decisions. It only remains for this court, upon a careful consideration of the numerous authorities which have been cited, to endeavor to deduce from the whole, such principles as are warranted by good sense and sound reason. And we think it very clearly established: 1. That the restrictions upon the general right of appeal to the Court of Errors, result *principally* from that provision of the constitution of the state which makes it imperative upon the chancellor and upon the judges of the Supreme Court, to inform the Court of Errors of the reasons of their judgments. 2. If

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Stevens v. Townsend.

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the error alleged in the appellate court, could not have been obviated in the court below, by proof or amendment, had objection been there made, the appeal will be sustained.

It only remains now to apply these principles to the case before the court, and see how far they are applicable.

The provision in the constitution of New York renders it *imperative* upon the chancellor in case of appeal, to inform the appellate court of the reasons of his decree. The statute of this state is not *mandatory* in this respect, but simply *authorizes* the chancellor to sit with the judges of this court in cases of appeal and inform them of the reasons of his decree; and such has been the practical construction which this provision has received, both from the chancellor and from this court; neither has ever regarded the provision as *mandatory* in its nature. If this construction of the statute be correct, the principal reason for restricting the right of appeal to the Court of Errors in New York, cannot apply to appeals to the Supreme Court of this state. With regard to the second rule which we have thought sustained by the Court of Errors of New York, but little need be said. The appellant does not complain of any irregularities in the proceedings below; he does not ask this court to review the case for the purpose of correcting errors of this nature, if any exist; but he simply asks this court, to review the merits of the case, as presented in the bill, answer and proofs; his complaint is, that the chancellor erred, in declaring that the conveyances specified in the decree, were fraudulent and void. Irregularities have been suggested, it is true, but for the purpose of showing (what may or may not be material), that the defendants below did not intend to waive their defense, or abandon their case. The objection then alleged, by way of error, could not have been obviated in the court below by proof or amendment.

*Stevens v. Townsend.*

But, on the part of the appellees, it was strenuously urged that the defendants below having made default, this court will not entertain the appeal; and in support of this ground, the same course of reasoning was adopted by counsel, in argument, which is to be found in the cases from New York which had been cited in this opinion. We know of no restrictions upon the right of appeal, but such as are prescribed by the law which confers that right: These restrictions are: 1. That the decree or order appealed from, should be final, and not merely interlocutory. 2. That the appellant file an approved bond within ninety days after the order or decree appealed from shall have been made. Admitting, however, for the sake of argument, that an appeal is not allowed to a party who has made default below, that default appearing upon the proceedings to have been regularly taken, it is questionable whether the proceedings in this present case, will justify the application of the principle. It will be perceived that the language employed by the legislature, conferring the right of appeal, is very comprehensive; and to deprive a party of a right thus secured, the evidence that there has been such a default as indicated an abandonment of the case by the party appealing, must be of such a character as to leave no reasonable doubt of the existence of such intention. In other words, rights deemed by the legislature, and by this court, as eminently important in their nature, cannot be regarded as having been waived by a forced inference, drawn from the conduct of a party during the course of proceedings in the court below, but the facts which justify such a conclusion, must be so clear and so decisive as to amount to positive evidence of a waiver.

This leads me to a consideration of the nature of the evidence by which this court is to be governed in establishing the fact whether a party prosecuting an appeal from chancery, abandoned his defense below. It cer-

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Stevens v. Townsend.

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tainly is in the power of the party in whose favor a decree is made, upon the default of the opposite party, so to frame that decree, as to show clearly that the default actually occurred. He is supposed to be familiar with the rules and practice by which the court is governed, and the facts necessary to be stated in the decree, to show that the party was regularly defaulted: If, therefore, the decree fails to recite such facts, it may be fairly inferred, that there was not, in point of fact, a *regular* default; and if not *regular*, then, in point of law, no such default exists, as will authorize this court to infer that there was an abandonment of the cause in the court below, by the party appealing, nor any such waiver as will deprive him of the right of appeal. It need not be stated that when a final judgment is rendered in a court of law, or decree made in a court of equity, in consequence of the default of a party, the facts necessary to constitute that default should affirmatively appear in the proceedings, otherwise such judgment or decree will be set aside, on motion, for irregularity. In establishing, for the first time, a rule on this subject, we think it most proper to adopt one warranted by the practice which prevails in courts of equity, safe and certain in its character, and convenient in its application ; and that rule is, that *where the appellee asks for the dismissal of an appeal to this court, from a decree of the Court of Chancery, on the ground of the default of the appellant in the court below, the decree must recite all those facts, which, by the rules and practice of the Court of Chancery, entitle a party to default his adversary.* The determination by this court, of the question whether a default has been regularly entered in the court below, will, by the adoption of this rule, be made to depend upon an inspection of the decree or order from which an appeal is taken, and the published rules of the Court of Chancery. They will furnish such evidence of the fact, as will preclude all that

*Stevens v. Townsend.*

doubt and embarrassment which would necessarily result from permitting evidence *dehors* the record, to be adduced; and, what is highly important, this rule will conduce to that certainty in the administration of justice, to attain which, it is the bounden duty of this court to exert all the powers with which it is invested.

Let us, then, apply the rules thus laid down, to the decree in this case, and see if the default there specified, is such an one as is recognized by the rules of the Court of Chancery, or known to its practice. The recital in the decree is as follows: "This cause having been heretofore brought on to be heard and decided upon the agreement and stipulation of the said Townsend and the complainants, and the answer of said Townsend, and upon exhibits read by stipulation and consent; and the said bill having been taken as confessed against the said William L. Colby and Samuel R. Bumpus, and upon hearing Mr. Lane and Mr. Buckbee, of counsel, for the complainants, and *no person appearing to argue said cause* on the part of said defendants, and due deliberation being had thereupon," etc. Does this recital contain such facts as will warrant the court in presuming, 1. That there was a default made by the defendants, and if so, 2. That it was such a default as deprives the party against whom it was entered, from appealing to this court? If there was a default, such default must be shown to have been warranted by the rules or practice of the Court of Chancery. Now, the only default disclosed in the decree, is, that no person appeared to *argue* the cause on the part of the defendants. Is there, then, any rule, which attaches so high a penalty to the failure of a party to *argue* his cause before the chancellor, as to deprive him of the right of appeal to this court? None has been shown, and none is presumed to exist. Does not the decree itself show, that the cause was heard upon the bill, the answer of Townsend, and

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Stevens v. Townsend.

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the exhibits which, by the stipulation of parties, were to be read at the hearing? Cannot a party submit his cause to the chancellor without argument, or upon briefs? We think he may, and, for aught that appears, he did. May not a party, when a cause is ripe for a hearing, confide in the learning, ability and integrity of the chancellor, before whom that cause may be pending, trusting, it may be vainly, in the strength of his cause, without endangering his right to have that cause reviewed by the appellate tribunal? To deny a party this right, under such a state of facts, would be to nullify the statute which confers it. But it is further recited in the decree, that "the cause having been heretofore brought on to be heard and decided upon the agreement and stipulation of the complainants and Townsend," etc. By the terms of that stipulation, the cause was to have been heard at the January term, 1842, of the Court of Chancery. Now, if we exclude from our view the evidence furnished by the affidavits and certificates which were read upon the argument, and confine ourselves to the matters contained in the decree and stipulation, would not the natural and necessary inference be that the cause was heard at the time stated in the stipulation, and that the subsequent hearing, at the July term, was a mere continuation of the argument had at the previous term? And thus the inference that the appellant abandoned his cause below is rebutted. If, however, the cause was not heard at the January term, pursuant to the stipulation, but at the July term following, then the evidence of a default contained in the decree is insufficient, because it does not state that "due notice of a hearing was given to the solicitor for the defendants, pursuant to the rules of the court;" 12 Johns., 494. And this court will presume nothing in favor of a party who seeks to deprive another of the benefit of a valuable right.

I have thus far considered the question under consider-

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*Stevens v. Townsend.*

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ation, solely with reference to the facts disclosed in the transcript, for the reason that I do not regard it as necessary to enter into the consideration of the matters disclosed by the papers, filed in support of and against the motion. The ground I assume is, that the decree itself contains no sufficient evidence of such default, as will authorize this court in assuming that the defendants below abandoned their defense.

I have, thus far, avoided the examination of the practice, which seems to prevail in the house of lords, in England, in cases analogous to that under consideration. It is admitted to be as was stated by the counsel for the appellees; but a careful consideration of the origin of the appellate jurisdiction of that court, has satisfied my mind that the rules of decision in that tribunal can have but little force or application to the appellate jurisdiction of this court. Considerations of expediency, accident, and ancient usage, have had much to do in determining the jurisdiction of that and other tribunals in England; a jurisdiction which is not defined, as here, by positive and written constitutions and laws, and regulated by rules of proceeding known only to the civil law. And by reference to *2 Hoff. Pr.*, p. 14, it will be found that the Court of Errors has adopted the practice in the house of lords, in cases of appeal, where no other rule is expressly provided. This circumstance, taken in connection with the constitution of that court, admonishes us not to rely too much upon its practice and decisions.

We have carefully refrained from the expression of an opinion respecting the appellate jurisdiction of this court, but have confined ourselves to the facts of the case before us. We do not mean to be understood as affirming that the jurisdiction of this court, in appeals from chancery, is to be restricted to the extent contended for by counsel in argument. The determination of this question, when

*Stevens v. Townsend.*

it arises, must be considered with reference to principles not brought to view or necessarily involved in the discussion of this particular case. We should then have to consider the nature and general jurisdiction and powers of this court; the organization of our whole judicial establishment; its history from the establishment of a territorial government to the present day; and the application of the rules which obtain, in cases of appeal, where the proceedings are regulated according to the course of the civil, and not the common law. When a case is properly presented, bringing such a question directly before this court for its determination, these various topics will undergo discussion, and the question will be decided with all the care and circumspection which its importance demands.

*Motion denied.*

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The People v. Foote.

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**The People v. Foote.**

This court will overlook matters of form in proceedings before justices of the peace, and regard them according to the merits.

Where an issue, formed upon a plea of not guilty to a declaration in replevin, was tried by a jury in a justice's court, who returned a verdict as follows : " *This jury find for the plaintiff*"—Held, that, although not a formal verdict in replevin, yet it sufficiently indicated for which party the jury had found the issue, and that it was the duty of the justice to enter the verdict in the proper form, according to the substantial finding, and to render judgment thereon. (a)

The justice having refused to enter the verdict, and render judgment thereon, on the ground that it was insufficient, the court granted a *mandamus* to compel him to do so.

The justice had no power to award a *venire de novo* after the rendition of such verdict.

On the application of George Lamberton, the relator, a rule was granted during the present term of this court, requiring the respondent, Orange Foote, a justice of the peace for the town of Avon, Oakland county, to show cause before this court, why the mandate of the court should not be issued, commanding him to enter the verdict rendered by the jury in a cause tried before him, December 19, 1842, wherein the relator was plaintiff, and Jacob and Marshall S. Hadley, were defendants, and to render judgment thereon.

For cause, the respondent returned the following facts : A writ of replevin was issued in the cause mentioned in the rule, returnable before the respondent, and was duly served and returned. The parties appeared on the return day of the writ, and the plaintiff declared in replevin for the unlawful detention of one cutting-table. The defendants pleaded not guilty, and gave notice that they would

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(a) See Gaines v. Betts, 2 Doug. 98; Averall v. Pero., 7 Mich., 315; Lockwood v. Drake, 1 Mich., 14, 16.

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*The People v. Foote.*

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prove on the trial, that the cutting-table was the property of the defendants, and not of the plaintiff, and that neither of them had detained the same from the plaintiff. The cause was subsequently tried, both parties being present with their witnesses, before a jury, who returned a verdict in writing, signed by each juror, as follows: "*This jury find for the plaintiff.*" The verdict was announced by the justice; the jurors were paid their fees, and they separated.

The defendants then objected to the rendition of any judgment upon the verdict, on the ground that it did not, *in form*, award that the right to the property was in the plaintiff, and that the defendant had wrongfully detained it, etc. The justice sustained the objection, and refused to enter judgment upon the verdict.

The plaintiff then moved that a *venire de novo* be awarded, which motion was granted by the justice, although opposed by the defendants, and the cause was continued to a future day named. No further proceedings were had in the case.

*Hunt & Watson*, for the relator.

*Geo. W. Wisner*, for the respondent.

**RANSOM**, J., delivered the opinion of the court.

The question raised upon the facts returned is, whether the verdict found by the jury was sufficient to lay the foundation for a judgment in favor of the plaintiff. Was the intention of the jury so manifested by it, as to enable the justice to ascertain with certainty for which party they had found the issue? If so, the verdict was sufficient, and the justice should have rendered judgment agreeably to its finding.

It is perfectly clear that the jury intended to determine the issue against the defendants, and, although their ver-

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*The People v. Foote.*

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dict was informal, the justice ought to have entered it according to the substantial finding, and to have rendered judgment. We are to overlook matters of form, and to regard proceedings before justices of the peace according to the merits.

This view is fully sustained by *Felter v. Mulliner*, 2 Johns., 181, in which the plaintiff declared against the defendant for killing his horse; the defendant plead a former judgment in his favor before another justice, for the same cause of action; and the evidence of the former judgment was, that the jury returned "*no cause of action*," and that no judgment was rendered thereon. Upon *certiorari*, the court held that the verdict in the former suit was substantially a verdict for the defendant; that the justice should have rendered judgment for the defendant accordingly, and that the plea was sustained by the evidence.

*Thompson v. Button*, 14 Johns., 86, was replevin; two issues were joined. The jury found generally that the defendant was *not guilty*. The court, in deciding the cause upon writ of error, said: "The intention of the jury cannot be mistaken, and the omission to enter a verdict applicable to the particular issue, is mere matter of form."

*Hawks v. Crofton*, 2 Burr., 698, was for an assault and battery. Several pleas were pleaded besides not guilty. The judge found a verdict in these words: "Guilty of the trespass within written." Upon error brought, Lord MANSFIELD said: "The question is, whether this verdict is so uncertain that the court cannot give judgment upon it, but must award a *venire facias de novo*. The principle is true and just, that where the intention of the jury is manifest and beyond doubt, the court will *set right* matters of *form*, and the mere act of the clerk."

In *Hob.*, 54, it is said, "the rule is just, that though the verdict may not conclude *formally*, or *punctually*, in

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*The People v. Foote.*

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the words of the issue, yet, if the point in issue can be concluded out of the finding, the court shall work and mold it into form, according to the real justice of the case."

Applying the principle of these decisions to this case, it is apparent that the plaintiff was justly entitled to a judgment upon the verdict of the jury.

The justice should have entered the verdict in form, following the issue made up by the pleadings, and awarding adequate damages for the detention of the property. All the proceedings had in the case, subsequently to the finding the verdict by the jury, were *coram non judice* and void. The awarding a *venire de novo* was, in effect, granting a new trial of the cause, which the justice possessed no power to do. After the cause was submitted to the jury, and they had found and returned a verdict, the powers of the justice were exhausted, except to award damages to the plaintiff for the detention of the property by the defendant, to enter judgment upon the verdict, and issue execution accordingly.

The *mandamus* must be granted.

*Mandamus granted.*

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City of Detroit v. Jackson.

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**The Mayor, Recorder, Aldermen and Freemen of the City of Detroit v. Charles Jackson, Noah Sutton, Shubael Conant, Abram C. Caniff, and DeGarmo Jones.**

Error cannot be assigned, in the decision, by the court below, of a motion, founded upon affidavits, to vacate a judgment; such motion being addressed merely to the sound discretion of the court. (a)

Where the execution by one of the parties, of an agreement, under the statute (R. S. 1888, p. 581), to submit matters in difference to arbitration, appears to be by an agent, the certificate of the officer taking the acknowledgment of the agreement, that such party appeared before him, by such agent for that purpose duly appointed, and acknowledged the same, is sufficient evidence of the execution of the agreement, and of the authority of the agent, to authorize the arbitrators to hear and determine the matters submitted to them, and the Circuit Court to render judgment upon their award.

A corporation may appoint an agent by parol. (b)

The authority of an agent of a corporation, may be inferred from the adoption or recognition of his acts by the corporation; and the acts so recognized or adopted will bind the corporation.

The award of arbitrators, under the statute, is an official act, and is itself the evidence and authority, upon which the Circuit Court may render judgment.

A judgment, rendered upon an award, pursuant to the statute (R. S. 1888, p. 582), will not be reversed on error, on the ground that it does not appear that an agent, who executed the agreement for submission on behalf of one of the parties, had authority so to do, where the award recites, that such party was duly notified of the hearing before the arbitrators, and appeared, and was heard with his witnesses and counsel, and where, being deemed in the court by the statute (R. S. 1888, p. 582, § 10), he allowed the judgment to be entered on the award, without objection, on the ground of such agent's want of authority; but the court will infer from these facts a recognition and adoption, by the party, of the act of his agent, in executing the submission, even where such party is a corporation.

Where it distinctly appears in the body of a parol agreement, signed by an agent in his own name, without the addition of the name of his principal, that the principal is the contracting party, the agreement will be construed to be that of the principal, and not of the agent.

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(a) Same principle affirmed and explained, *Polhemus v. Ann Arbor Savings Bank*, 27 Mich., 45, 51, and numerous cases there cited.

(b) Affirmed, *Jhons v. People*, 25 Mich., 503. See *Taymouth v. Kobler*, 35 Mich., 26.

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City of Detroit v. Jackson.

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It seems, that the rule, that an attorney or agent, to bind his principal, must sign the name of the principal, applies only to deeds, and not to simple contracts.

An agreement, under the statute (R. S. 1888, p. 531), to submit matters in difference to arbitration, need not be under seal.

A judgment, rendered in favor of A. and B., against C., upon the award of arbitrators, on filing the same pursuant to the statute (R. S. 1888, p. 532, § 9), will not be reversed on error, on the ground that B. had no claim against C., he having joined with A. in executing the submission to arbitration, of all matters arising out of a contract between A. and C., for the faithful performance of which contract by A., he was recited in the submission, to be bound to A. by a separate instrument, and the award having been made in favor of both A. and B.

In error, on *certiorari* from Wayne Circuit Court. The record returned by the court below, set forth an agreement between the parties to this cause, to submit certain matters in difference between them to arbitration, the award of the arbitrators, and a judgment thereupon rendered in the court below; all of which were in pursuance of *Ch. 7, Title 4, Part 3, of the Revised Statutes*.

The agreement to submit to arbitration was, in part, as follows:

“ Know all men by these presents, that the mayor, recorder, aldermen and freemen of the city of Detroit, *by Zina Pitcher, mayor of said city, and agent for that purpose duly appointed*, and Charles Jackson, Noah Sutton, De Garmo Jones, Shubael Conant and Abram C. Caniff, have agreed to submit the final settlement of all matters and things arising from, or growing out of, the contract between the said mayor, recorder, aldermen and freemen of the city of Detroit, of the one part, and the said Charles Jackson and Noah Sutton, of the other part, dated March 31, 1840, relative to the new Hydraulic Works of the city of Detroit, according to the said contract and specifications therewith connected (for the faithful performance of which in all its parts, the said *De Garmo Jones, Shubael Conant and Abram C. Caniff are sureties* for the said Jackson and Sutton, by bond bearing even

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City of Detroit v. Jackson.

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date with the said contract"), etc. [setting forth particularly the matters submitted], "to the determination of Levi Cook, Reynolds Gillett and Thomas Palmer, of," etc., "the award of whom, or a greater part of whom, being made and reported, within three months from this day, to the Circuit Court for the county of Wayne the judgment thereon shall be final; and if either of the parties shall neglect to appear before the arbitrators after due notice given to them of the time and place appointed for hearing the parties, the arbitrators may proceed in his or their absence.

"Dated at Detroit, this 11th day of March, A. D. 1842."

(Signed) "Charles Jackson, Noah Sutton, *Zina Pitcher, mayor of Detroit*, Shubael Conant, D. G. Jones, and A. C. Caniff."

The certificate of the acknowledgment of this agreement, before a justice of the peace, was in the form prescribed by the statute, and set forth that, "The said mayor, recorder, aldermen and freemen of the city of Detroit, *by Zina Pitcher, mayor of said city, and agent for that purpose duly appointed,*" appeared and acknowledged the same.

The award recited the agreement for submission, that due notice was given to the parties of the time and place of hearing, and that the parties were present, and heard with their witnesses, and by their respective counsel.

The judgment upon the award was in favor of the defendants in error, and against the plaintiffs in error, was rendered May 25, 1842, and was for the sum of \$2,204.00 (the amount awarded by the arbitrators), and costs.

Sundry affidavits, in reference to the submission, the award, and the proceedings before the arbitrators, which were used in the court below, on the hearing of a motion there made by the plaintiffs in error, to vacate the judgment, were also returned into this court with the record.

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City of Detroit *v.* Jackson.

The errors assigned were :

1. The submission to arbitration was not duly executed by the plaintiffs in error.
2. The submission embraced matters not authorized by the common council of the city of Detroit.
3. The award is erroneous in being made in favor of Jackson and Sutton *and their sureties*.
4. It is erroneous in that it awarded for certain extra work mentioned.

The grounds upon which the *second* and *fourth* errors assigned, were based, appeared only in the affidavits above mentioned.

*O'Flynn & Witherell*, for plaintiffs in error.

*H. T. Backus*, for defendants in error.

FELCH, J., delivered the opinion of the court.

The statute, *R. S.*, 531, *Ch.* 7, provides, that all controversies, which might be the subject of an action at law, or of a suit in equity, may be submitted to the decision of one or more arbitrators, to be appointed by agreement between the parties, in the form, and executed in the manner prescribed. It further provides, that the award of the arbitrators so appointed, being made and reported to the court designated in the submission, may be accepted or rejected by the court, for any legal and sufficient reason, or may be recommitted to the same arbitrators, for a rehearing by them ; and that when an award is accepted and confirmed, judgment shall be rendered thereon, in the same manner as upon a like award made by referees appointed by a rule of court, and execution shall issue thereon accordingly : *R. S.* 532, § 9.

The award is in fact the foundation of the judgment,

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City of Detroit v. Jackson.

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and the power of the arbitrators to make the award, depends upon the submission of the parties. The papers filed in the Circuit Court, upon which the judgment in this case was rendered, were the award, and the submission of the parties which accompanied the same. The *certiorari* in this case, brings before us only the record, and presents the single inquiry, whether the submission and the award are sufficient, upon their face, to give evidence of jurisdiction, and to authorize the Circuit Court to render judgment against the plaintiffs in error.

It is proper here to remark, that sundry affidavits have been returned with the record in this case, in reference to the submission, the award, and the proceedings before the arbitrators, which were used in the Circuit Court, on the hearing of a motion there made by the plaintiffs in error, to set aside the judgment. It was unquestionably in the power of that court to have vacated the judgment, and to have recommitted the award to the arbitrators. But the motion was addressed to the sound discretion of the court, like an application to set aside a verdict, and for a new trial; and the refusal of the court to grant it, cannot be here assigned as error; nor can any matters contained in the affidavits, authorize this court to reverse the judgment below. Our attention must be confined to the record, and must be directed to the simple inquiry, whether the judgment appears to have been regularly rendered upon the submission and award filed as the foundation thereof.

We shall consider the several objections to the regularity of the judgment, raised by the plaintiffs in error.

1. It is contended that the authority of Zina Pitcher to execute the submission on behalf of the plaintiffs in error, should have appeared from the record. The statute above mentioned (*R. S.*, 531, § 2) provides for the execution of the submission by the parties in person, or by their lawful

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City of Detroit v. Jackson.

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agents or attorneys. They are required to appear before a justice of the peace, and acknowledge the submission in the form given in the statute. In this case, the certificate of the justice shows that the plaintiffs in error appeared "*by Zina Pitcher, mayor of the said city, and agent for that purpose duly appointed,*" and acknowledged the submission. The jurisdiction of the court must, of course, depend upon the voluntary submission of the parties; and one purporting to act as an agent, must have due authority so to act, in order to bind his principal. But in all cases of jurisdiction, the law establishes certain proceedings as prerequisites, and fixes the evidence of such proceedings. In suits commenced by summons, the official return of the sheriff, showing personal service, is sufficient to give the court jurisdiction; and so it is where the return is made by his deputy. In neither of these cases would the record of the judgment contain any evidence of the genuineness of the signature of the officer to the return, nor would it show, in the latter case, that the deputy had authority to act for his principal. In the case of arbitration under the statute, the evidence of the submission, which gives authority to the arbitrators, to hear and determine the matters submitted to them, and to make and return to the Circuit Court an award upon which judgment may be there rendered, is the official certificate of the justice taking the acknowledgment. When it appears by that certificate that the party appeared, and that the appearance was by an agent duly authorized for that purpose—the statute having permitted an appearance in this manner—I think the necessary inference is, that the agent was duly authorized. It would be competent to produce the authority of the agent before the justice taking the acknowledgment, as the foundation of the certificate that the principal appeared by his agent; and I am aware of no rule which would require him to annex to his certificate, the

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City of Detroit v. Jackson.

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proof of such authority. We are to consider this certificate as true; and, if so, it was clearly sufficient to authorize the Circuit Court to take cognizance of the case, and to render judgment on the award.

If, in fact, the submission in this case had been made by Zina Pitcher, as agent, without authority from the plaintiffs in error, it would have been competent for them to have availed themselves of such want of authority, by assigning it as an error in fact; but this they have not done.

There is another reason why this judgment should not be reversed, on the ground that the record does not show that the agent, who executed the submission, had authority to do so. The record itself shows, that the plaintiffs in error ratified the act of their agent in executing the submission. The award made by the arbitrators according to the statute, is an official act, and is itself made the evidence and the authority upon which the Circuit Court may proceed to render judgment. The award in this case shows, not merely that the plaintiffs in error entered into the submission, but that they were duly notified of the hearing before the arbitrators, and were present, and heard with their witnesses and their counsel. The statute (*R. S.*, 532, § 10) provides, that the parties shall attend at every term of the court, in which, by the terms of the submission, judgment may be entered on the award, within the time limited by the submission for filing the award, without any express notice for that purpose, in like manner as if an action for the same cause were pending between them in the same court. The plaintiffs in error, having actually appeared before the arbitrators, pursuant to a submission which purported to have been entered into by them, and being, also, by the statute, considered in court, on the filing the award and the entry of judgment thereon, must be deemed to have waived any objection which might have existed, to the authority of the

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City of Detroit v. Jackson.

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agent to enter into the submission. Whether the agent had authority or not, was merely a question of fact, wherever raised, and one which should have been settled by evidence adduced by the parties. If the plaintiffs in error saw fit to appear and contest the claim throughout, on its merits, or, being duly in court, did not there raise any objection to the authority of the agent who entered into the submission, they must be deemed to have acquiesced in that authority, and cannot here claim a reversal of the judgment, on the ground, merely, that the letter of attorney is not found among the papers.

The general rule is, that an agent may be appointed by parol; and a subsequent recognition of his acts is usually sufficient to bind the principal. It seems to have been formerly supposed that the agent of a corporation must be appointed by an instrument under the seal of the corporation. Such, however, is not now the doctrine, either in England, or in this country: *Bank of United States v. Dandridge*, 12 Wheat., 64; *Yarborough v. The Bank of England*, 16 East., 6; *Roe v. Dean, etc., of Rochester*, 2 Camp., 96; 2 *Kent's Com.*, 613. And, in *Story on Agency*, § 52, it is said, that as the appointment of an agent of a corporation, may not always be evidenced by the written vote of the trustees, directors, or other functionaries of such corporation, it is now the settled doctrine, at least in America, that it may be inferred and implied from the adoption or recognition of the acts of the agent by such functionaries, or by the corporation. In *Milliken et al. v. Coombs et al.*, 1 Greenl., 343, an arbitration bond was executed by Wheaton, as agent of the defendants, but in fact without proper authority. The defendants, however, subsequently recognized the authority by giving a power of attorney, antedated, and this was held to make the submission binding upon them. In delivering their opinion, the court also advert to the fact,

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*City of Detroit v. Jackson.*

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that the defendants were present at the hearing before the arbitrators, managing and conducting the business, and making no objection to Wheaton's want of authority to enter into the submission.

There can be no more reason in requiring the record to show the power of attorney under which the agent acted, than there would be in requiring it also, if such authority appeared, to show the proof of its due execution, and in the case of a corporation like the plaintiffs in error, to show the organization and vote of the common council.

2. It is contended that, admitting the authority of Zina Pitcher to enter into the submission on behalf of the plaintiffs in error, he has not so executed the agreement for submission, as to bind his principals. "*The Mayor, Recorder, Aldermen and Freemen of the city of Detroit, by Zina Pitcher, Mayor of said city, and agent for that purpose duly appointed,*" is the description of the contracting party in the body of the agreement; and the justice's certificate of its acknowledgment describes the party appearing before him, in precisely the same words. But the agreement is signed "*Zina Pitcher, Mayor of Detroit,*" without any other addition; and it is contended that a disclosure of the agency should have been made by an addition to the signature, as well as by description in the body of the instrument.

It is perfectly competent for an agent, who has due authority to contract on behalf of his principal, so to execute an instrument, as to make himself personally responsible for his principal. Thus in *Stone v. Wood*, 7 *Cir.*, 458, the defendant described himself in the charter party on which the suit was brought, as agent for J. & R. Raymond, but in fact agreed for himself, his executors and administrators, to pay the freight therein mentioned, and was held to be bound personally. In *Spencer v. Field*, 10 *Wend.*, 87, the contract was made between the defendant

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City of Detroit *v.* Jackson.

and "James Hillhouse, commissioner of the school fund for the state of Connecticut, for and in behalf of said state," was under seal, and was signed "James Hillhouse, commissioner of the school fund." It was held that it was not the contract of the state. In *Pentz v. Stanton*, 10 Wend., 271, the plaintiff declared on a bill of exchange, drawn by, and signed "H. T. West, agent." The suit was against the principal, who has held not to be bound, his name not appearing on the bill. *Taft v. Brewster and others*, was upon a bond, in which the defendants, by the name and description of "Jacob Brewster, Thaddeus Loomis and Joseph Coats, trustees of the Baptist society of the town of Richfield, acknowledged themselves to be held and firmly bound," etc. The same description was added to their signatures. It was held to be their individual bond, and not that of the Baptist society. See also 13 Johns., 807; 4 Mass., 595.

In these and numerous other cases of the same class, the court have simply looked to the form of the instrument itself, in order to ascertain whether it is the contract of the principal, or of the agent personally. If, by the terms of the agreement, a party describing himself as agent, undertakes to do certain things, the mere addition of the word agent, or indeed any other designation which he may add to his name, will not make it the contract of his principal. Such addition will be regarded as mere description; and will not have the effect of binding a third person, who is not, in form, made a party to the instrument. It is not enough that the person executing an instrument have power as agent to bind a third person; he must, in fact, make it the obligation of that person in terms, in order to bind him.

But in determining whether an instrument, executed by an agent, contains the obligation of the principal, we are to look to *the whole instrument*. The particular form of

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City of Detroit v. Jackson.

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execution is not material, if it be substantially done in the name of the principal : *Magie v. Hinsdale*, 6 Conn., 464; *Pentz v. Stanton*, 10 Wend., 275. In this case, the plaintiffs in error are fully described in the body of the agreement for submission, as the contracting party. The submission is directly asserted to be theirs ; the name of the agent is given, as the instrument, through whom the act is done. The agent does not purport to act for, or in any manner to bind himself, personally. On the contrary, the body of the instrument fully shows, that he is the mere agent, and that the submission is the submission of the plaintiffs in error. It is in the precise form given in *Spencer v. Field*, 10 Wend., 87, as the proper form of drawing an instrument, to be executed by an agent, so as to bind his principal. It is signed "*Zina Pitcher, mayor of Detroit.*" Were there nothing in the body of the instrument, which clearly showed who was the contracting party, it would not certainly bind the plaintiffs in error. But here, the capacity in which Pitcher acted, is fully explained. No part of the instrument shows that he makes any contract individually ; but the whole of it shows that he acts as the agent for the plaintiffs in error, and to have added or prefixed their name to his signature, would have been but to repeat, in the same instrument, what already sufficiently appeared.

It is true there are cases which appear to establish the doctrine, that the name of the principal must be signed to an instrument executed by an agent. But in the case of the *New England Marine Insurance Co. v. De Wolf*, 8 Pick., 56, PARKER, C. J., in delivering the opinion of the court, remarks, that "the authorities cited to maintain this position, are of deeds only; instruments under seal." No doubt this is the rule in regard to sealed instruments. Not only must the principal's name be signed to them, but his seal must be affixed also : *White v. Crayler*, 6 T. R., 176;

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City of Detroit v. Jackson.

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*Wilkes v. Back*, 2 *East.*, 142; 2 *Caine's*, 66; *Elwell v. Shaw*, 16 *Mass.*, 42; *Combe's Case*, 9 *Co.*, 76, b; *Frontin v. Small*, 2 *Ld. Raym.*, 1418; *Fowler v. Shearer*, 7 *Mass.*, 14; 1 *Greenl.*, 281. Where, however, the instrument is not under seal, a different rule prevails. In such cases, it is enough if the contract is made in the name of the principal, and as his contract, through the agent, and the signature of the agent is made to the instrument purporting to charge his principal. In the *New England Marine Insurance Co. v. De Wolf*, before cited, the declaration was upon a guaranty indorsed on the back of a note, given for a premium on insurance, as follows: "By authority of J. De Wolf, junior, in a letter dated September 24, 1824, I hereby guaranty his payment of the premium or policy No. 10079. Isaac Clap." It was held that the defendant was bound as guarantor of the notes; Clap, the agent, having authority to sign for his principal, and his intention to do so, being evident from the warranty itself.

A familiar instance of the manner of executing a contract by an agent, is found in the case of bank-bills. They are, upon their face, the promises of the corporation by which they were issued; but they are signed by the president and cashier, with an abbreviation showing only the capacity in which they sign. It has never been contended, that, because these agents did not add to their signatures the name of the corporation, they were personally bound, and not the corporation. Even where a check was drawn by the cashier of a bank, and it appeared doubtful whether it was an official or a private act, parol evidence has been admitted to show that it was an official act, for the purpose of making the bank responsible: *Mechanics' Bank v. Bank of Columbia*, 5 *Wheat.*, 326; *Story on Agency*, 268, note.

We entertain no doubt as to what is the proper construction of the agreement for submission in this case.

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*City of Detroit v. Jackson.*

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We think the plaintiffs in error must be regarded as one of the contracting parties, although their agent has signed his own name to it, without adding the name of his principals.

3. A third objection is, that the seal of the corporation is not affixed to the submission. It is a sufficient answer to this objection, to say, that no seal is required to be affixed to such an instrument. If the agent was authorized to enter into the submission for the corporation, it was competent for him to do so in the ordinary manner, and we know of no authority which requires the seal of the city to be affixed to the agreement.

4. The fourth objection is, that the award is made, and the judgment thereon rendered, in favor of parties who had no claim against the corporation, the plaintiffs in error. Jackson and Sutton were contractors with the corporation, for building certain hydraulic works; and Conant, Caniff and Jones, were their sureties, merely, and that, by an instrument separate from the articles of agreement between the corporation and Jackson and Sutton, though bearing even date therewith. The award is in favor of both the principal contractors and their sureties.

Both are parties on the one part, to the submission, which is in general terms of the matters growing out of the contract in which both were interested. It was a matter of policy, with the plaintiffs in error, to make the sureties parties to the submission and award, so that, in case judgment was rendered in their favor, it would be against them as well as against their principals. They have voluntarily submitted the matters in difference, making the sureties parties, and cannot now claim a reversal of the judgment, on the ground that, being liable only as sureties, they had no claim against the city. We cannot here inquire what proof was required or adduced before the arbitrators, to establish the claim of the defendants in

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Scott v. Detroit Young Men's Society's Lessee.

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error. We can only look to the submission and the award. The former shows clearly a submission of certain claims and demands between the plaintiffs on the one hand, and the defendants on the other, and the award is in pursuance of the submission, and between the same parties. If it had been in favor of the corporation, it would have been against all of the defendants in error; as it is the other way, the plaintiffs in error must abide the result.

From a view of the whole case, we are satisfied that there is no error in the record, and the judgment must, consequently, be affirmed.

*Judgment affirmed.*

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**John Scott and Carl Boland v. The Detroit Young Men's Society's Lessee.**

The territory of Michigan, as established by the act of congress of January 11, 1805, did not remain subject to the territorial government, until the admission of the state of Michigan into the Union by congress, January 26, 1837; but the state came into existence, and possessed the power of independent state legislation, on the adoption and ratification, by the people of the territory, of the constitution of the state, and the organization of the state government.

The "Act to incorporate the Detroit Young Men's Society," passed by the legislature, and approved by the governor of the state, March 26, 1836, was not invalid on the ground that the state government had no legal existence until after the admission of Michigan into the Union, January 26, 1837.

Article V, of the articles of compact contained in the "Ordinance of 1787, for the government of the territory of the United States northwest of the river Ohio," secured, absolutely and inviolably, to the people of the territory of Michigan, as established by the act of congress of January 11, 1805, the right to form a permanent constitution and state government, whenever said territory should contain sixty thousand free inhabitants; and that right could in no way be modified or abridged, or its exercise controlled or restrained, by the general government. The

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*Scott v. Detroit Young Men's Society's Lessee.*

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formation of the constitution and government of the state of Michigan, must, of necessity, have preceded her admission into the Union by congress.

The assent of congress to the admission of Michigan into the Union was only necessary, because the older states represented in congress possessed the physical power to refuse a compliance with the terms of compact contained in the Ordinance of 1787, and there was no third party to which the state could resort to enforce such compliance; but the right to such admission, secured by Article V of the Ordinance, became absolute and unqualified, on the adoption of the constitution of the state, and the organization of the state government.

Notwithstanding the previous organization of the state government, the governor and judges of the territory of Michigan, holding their offices and appointment under the authority of the United States, remained in office, and competent to execute the powers conferred upon them by the act of congress entitled "An act to provide for the adjustment of titles of land in the town of Detroit, and territory of Michigan, and for other purposes," approved April 21, 1806, until, after the 1st day of July, 1836.

They continued in office, and in the full and undiminished exercise of their powers as governor and judges, over the country lying west of lake Michigan, which formed a part of the territory of Michigan, at the time of the organization of our state government, until after the 3d day of July, 1836, when the territory of Wisconsin was organized.

The jurisdiction and powers of the judges of the territory of Michigan, as a District and Circuit Court of the United States, conferred by acts of congress of March 3, 1805 (Story's Laws, U. S., 973), and February 19, 1831 (Gord. Dig., § 520), remained unaffected by the organization of the state government, and were retained by them, until their offices were abolished by express legislation of congress, to take effect on the admission of Michigan into the Union.

The organization of our state government in its various departments, was gradual and progressive; and that no inconvenience might arise therefrom, it was provided by Sec. 5, of the schedule annexed to the constitution of the state, that all officers, civil and military, then holding their offices and appointments in the territory, under the authority of the United States, or under the authority of the territory, should continue to hold and exercise their respective offices and appointments, until superseded under the constitution. As the judges of the Supreme Court of the state did not enter upon their official duties, and the law under which they were appointed did not take effect until after July 4, 1836, it might be plausibly contended, that the judges of the territory remained in office, and that their offices were not superseded until that time.

Congress having authorized the governor and judges of the territory of Michigan for the time being, to convey certain lands, the fee of which was in the United States, and having, by acts of legislation, recognized the persons who assumed to

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Scott v. Detroit Young Men's Society's Lessee.

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convey such lands, by virtue of such authority, as incumbents of those offices, and the existence of those offices, at, and subsequent to, the time when such conveyance was made, a mere stranger will not be permitted to controvert the title acquired by such conveyance, on the ground that the grantors were not, at the time of the grant, such governor and judges, and that there were no such offices.

If the principal recognize and affirm the existence and acts of an agent, a mere stranger will not be permitted to controvert either.

Where several persons are empowered by law to execute a public trust or power, and, in the execution thereof, all are present to deliberate, the act of a majority will be valid.

They will all be presumed to have been present, and to have deliberated upon the act, unless the contrary expressly appears.

The land board constituted by the act of congress, entitled "An act to provide for the adjustment of titles of land in the town of Detroit, and territory of Michigan, and for other purposes," approved April 21, 1806, did not consist of two integral parts, the governor, and the judges of the territory of Michigan; but of four persons, designated by their names of office, any three of whom were authorized to execute any of the powers conferred by the act; and a deed of bargain and sale, executed by the judges only, is valid.

Parol evidence is admissible, to prove official character. (a)

A treasurer's deed executed October 10, 1833, in consummation of a sale of land for the taxes of 1832, is, at best, evidence of the regularity of the treasurer's sale only; and is not admissible in evidence to prove title, unless accompanied by proof, that the taxes had been legally assessed and returned, and that all the proceedings anterior to the sale had been in conformity to the statute. (b)

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(a) Affirmed as to public officers, *Facey v. Fuller*, 18 Mich., 527; *People v. Marion*, 31 Mich., 31, 38; and also as to officers of corporations, *Cahill v. Kalamazoo Mutual Insurance Company*, 2 Doug., 124; *Druro v. Wheeler*, 22 Mich., 489; *Jhons v. People*, 25 Mich., 500.

(b) Affirmed, *Ives v. Kimball*, 1 Mich., 308; *Latimer v. Lovett*, 2 Mich., 204; *Farmers and Mechanics' Bank v. Bronson*, 14 Mich., 381. See *Rowland v. Doty*, 1 Harr. Ch. R., 9. It is believed that under all the statutes on this subject in force prior to the act of February 16, 1842 (see L. 1827, p. 378; L. 1833, p. 96, § 15; R. S. 1838, p. 96, § 20), the burden was upon the purchaser, to show the regularity of the proceedings anterior to the sale, but that under the statutes which have been in force since that time, the burden has been upon the other party. (S. L. 1842, p. 96, § 53; S. L. 1843, p. 58; C. L. 1857, § 871; S. L. 1868, p. 185; S. L. 1869, p. 356, § 91; C. L. 1871, § 1057; *Sibley v. Smith*, 8 Mich., 486; 9 Mich., 382; 13 Mich., 329, 414.

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*Scott v. Detroit Young Men's Society's Lessee.*

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*Held,* That certain parol proof, and also a resolution of the governor and judges of the territory of Michigan, offered in evidence for the purpose of showing an assignment by them prior to 1836 of certain premises, were irrelevant and inadmissible.

Error to Wayne Circuit Court. Ejectment, brought by the defendants in error, to recover possession of lot 56, section 1, in the city of Detroit. Plea, not guilty. The cause was tried at the November term, 1839, before Hon. GEO. MORELL, presiding judge.

On the trial, the defendants in error, to prove their corporate existence, their right to take and hold real estate, and to sue for its recovery, offered in evidence what purported to be an act of the legislature of the state of Michigan, entitled "An act to incorporate the members of the Detroit Young Men's Society," approved March 26, 1836, by Stevens T. Mason, as governor of the state. The plaintiffs in error objected to its introduction, on the ground that the government of the *state* of Michigan was not established, and neither the legislative, nor executive departments of such a government had any legal existence on the 26th day of March, 1836, and prior to the admission of the state into the Union by congress, January 26, 1837. The court overruled the objection, and permitted the act to be read to the jury.

They also proved user of their corporate rights, under the act above mentioned.

They offered in evidence, what purported to be a deed of the lot described in the declaration, from the governor and judges of the territory of Michigan, to the Detroit Young Men's Society, executed by Solomon Sibley, Geo. Morell and Ross Wilkins, as such judges, and dated July 1, 1836; having first proved that the deed was executed by Sibley, Morell and Wilkins, on the day of its date, and that they were then reputed to be, and were, in fact, acting as judges of the territory of Michigan, and that John S. Horner was then reputed to be governor of said

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*Scott v. Detroit Young Men's Society's Lessee.*

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territory, under the authority of the United States. The plaintiffs in error objected to the reading of this deed in evidence, because: 1. At the time of its execution, the governor and judges of the *territory* of Michigan, had no legal existence; the territorial government and offices having been superseded and abolished, by the adoption of the state constitution, and the organization of a government, and the election and appointment of officers under it; 2. The governor of the territory did not join with the judges in the execution of the deed; 3. The deed was not acknowledged; 4. Parol evidence was inadmissible, to prove that the individuals who executed the deed, were judges of the territory of Michigan. All which objections were, by the court, overruled, and the defendants in error permitted to read the deed in evidence.

The plaintiffs in error, having shown that they had been in possession of the premises in question since 1836 (Boland holding under Scott), offered in evidence a deed from the treasurer of Wayne county, dated October 10, 1833, conveying the premises to Scott, for the taxes assessed theron for the year 1828. The defendants in error objected, that this deed could not be read in evidence, until it was shown that the title of the premises had passed out of the United States, so that they were liable to be assessed for the taxes of the year 1828, and that such taxes had been regularly assessed and returned. The court sustained the objection, and rejected the evidence.

Having introduced proof to show that the premises were known as lot 52, prior to April 27, 1807, the plaintiffs in error offered in evidence, to prove an assignment thereof, a resolution of the governor and judges, adopted March 13, 1807, that said lot 52, be assigned to Elijah Brush, as agent for Todd and McGill; proof of the parol declarations of the governor and judges, made to the assessor of the city in the year 1828, that the lot in question, had

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Scott v. Detroit Young Men's Society's Lessee.

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been conveyed, and was subject to taxation; and also, proof that the records of the governor and judges, had been inaccurately kept, and that many grants had been made, and deeds given, which did not appear from those records. All which evidence was objected to by defendants in error, and rejected by the court.

The records of the secretary of state, were read in evidence on the trial, showing that the legislature of the state of Michigan, was regularly organized, under the constitution of the state, November 3, 1835; and that Stevens T. Mason, having been duly elected and returned, on the same day, took the oath, and entered upon the duties of the office of governor of the state.

It also appeared in evidence, that John S. Horner acted as governor of the territory of Michigan, in July, 1835; that he was the last acting governor of the territory; and that he was reputed to have acted as such governor, until some time in the year 1836; that a session of the Supreme Court of the territory, was held by Geo. Morell and Ross Wilkins, judges, in June, 1836; and that Sibley, Morell and Wilkins, purported to act as judges of the territory, on the first day of July, 1836.

The evidence being closed, the counsel for the plaintiffs in error requested the court to charge the jury, specially, upon the points previously made, touching the validity of the act by which the defendants in error claimed to have been incorporated, and, also, of the deed under which they claimed title to the premises in question.

The court refused to charge the jury as requested, but instructed them that the Detroit Young Men's Society was well incorporated, by the act of March 26, 1836; and that the deed, under which they claimed title, was properly executed, by persons having power to execute the same, and to convey the premises therein described.

To the several decisions of the court, admitting or

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Scott v. Detroit Young Men's Society's Lessee.

rejecting evidence offered by the parties ; to the refusal of the court to charge the jury as requested ; and to the charge made by the court, to the jury, the plaintiffs in error excepted.

The jury found a verdict for the defendants in error.

The counsel for the plaintiffs in error tendered a bill of exceptions, and removed the record into this court by writ of error. The assignment of errors, and joinder therein, present the several questions raised at the trial.

*H. T. Backus*, for the plaintiffs in error.

1. Michigan was not a *state* but a *territory* on the 26th day of March, 1836, and the Detroit Young Men's Society was never incorporated.

The right of the people of the territory of Michigan to form a constitution and state government, secured by article fifth of the ordinance of 1787, could not be exercised without the assent of congress ; and the state government could not go into operation until after admission into the Union. Congress had the right to determine, on such application for admission, whether the constitution and frame of government were republican, and in conformity to the principles of the ordinance ; and to refuse admission if they were not.

Michigan was not a *state of the Union* prior to her admission by congress. She could not be a *state out of the Union*, for the ordinance of 1787 expressly provides that the *northwest territory*, and states which may be formed therein, shall forever remain a part of the confederacy of the United States, subject to the articles of confederation, and to such alterations therein as shall be constitutionally made, and to all ordinances of the United States in congress assembled, conformable thereto.

2. If Michigan was a *state* prior to March 26, 1836, then the territorial government was superseded ; there were no

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*Scott v. Detroit Young Men's Society's Lessee.*

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governor and judges of the territory on July 1, 1836, and the deed then executed, under which the plaintiffs below claim, was void. The act of congress of April 21, 1806, evidently conferred the trust under which this deed was executed upon those who, from time to time, should legally exercise the functions of governor and judges of the territory of Michigan. To the existence of such trustees three things were necessary. 1. The existence of the territory. 2. Of such offices in the territorial government; and, 3. Officers duly appointed to fill them, and in the actual legal exercise of their legal powers. But the territory ceased to exist when the state was organized. There were no such offices in the territorial government, because there was no such government.

Should it be contended that the offices and powers of the governor and judges were preserved by the schedule to the constitution of Michigan, § 5, and that the persons holding such offices continued to hold them, and were competent to execute the trust above mentioned, until they were superseded by officers chosen under the state constitution, it may be replied: 1. That the territorial governor was superseded by the election and qualification of a governor of the state November 3d, 1835; and, 2. That such offices were thereby made state offices, and the persons holding them state officers, deriving all their powers from the constitution and laws of the state.

3. As to the execution of the deed under which the defendants claim. To constitute a valid conveyance, it should have been executed by the governor, as well as the judges. The act of April 21, 1806, confers the powers under which it was executed. Sec. 1 empowers the governor and judges, *or any three of them*, to lay out a town, etc. But sec. 2 declares that the land, of which the premises in question are parcel, shall be *disposed of by the governor and judges aforesaid*; the qualification, "*or any three*

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*Scott v. Detroit Young Men's Society's Lessee.*

of them," being omitted. Words in a statute must receive their natural force and signification: *Brown v. Barry*, 3 *Dall.*, 366; *United States v. Fisher*, 2 *Cranch*, 358; *Pennington v. Cox*, 2 *Id.*, 33; *Wilkinson v. Leland*, 2 *Pet.*, 662; 1 *Brock.*, 162; 1 *Kent's Com.*, 461-2-7. The rule that the powers of trustees for public, and not private purposes, may be exercised by a majority of the trustees, does not apply here; the *statute* making it necessary that the governor should join: *King v. Pasmore*, 3 *T. R.*, 199; *Kyd on Corp.*, 36; *King v. Beltringer*, 4 *T. R.*, 810; *King v. Miller*, 6 *T. R.*, 268; *King v. Bullar*, 8 *East.*, 389; *King v. Williams*, 2 *M. & S.*, 141; *Polk's Lessee v. Wendell*, 5 *Wheat.*, 293; *Patterson v. Winn*, 11 *Wheat.*, 388; 6 *Pet.*, 691.

The deed should have been acknowledged. The power given by the act is to "make deeds to purchasers thereof;" which must be construed to mean the instruments known and recognized by the law of the land as deeds. When terms are used in a statute, which have a certain, technical, and legal definition, they must be taken in such sense in construing the statute: 1 *Kent's Com.*, 462; *Elliott v. Swartwout*, 10 *Pet.*, 137; *United States v. Twenty-four Coils of Cordage*, 1 *Bald. C. C. R.*, 505; 7 *Cow.*, 702; 1 *Bl. Com.*, 60; 2 *M. & S.*, 230; 1 *T. R.*, 728; 6 *Mod.*, 143. *Deed*, had a definite legal signification. By the laws in force in Michigan it signified, *ex vi termini*, an instrument signed, sealed, witnessed, and acknowledged or proved: *Ordinance of 1787*; *McCartee v. Orphan Asylum*, 9 *Cow.*, 437; *Wilson v. Troup*, 2 *Cow.*, 195.

*D. Goodwin and Geo. E. Hand*, for defendants in error:

*Hand* contended: 1. That under the ordinance of 1787, art. 5, the people of Michigan had an absolute right, when numbering 60,000 free inhabitants, to organize a state

Scott v. Detroit Young Men's Society's Lessee.

government, and be admitted by delegates into congress. The constitution empowers congress to *admit new states into the Union*; not to *create* them. The new state must *exist*, it must have an organized government, before it can be admitted. He referred to the various acts and historical events which resulted in the organization of the state government. The first legislature which assembled under the new constitution, at an adjourned session which commenced on the first Monday of February, 1836, enacted many important laws, providing in detail for the full establishment of the state government in all its departments. In fact, the whole fabric of our state government rests upon the acts and doings of this legislature. The act to incorporate the Detroit Young Men's Society, was enacted by this legislature, March 26, 1836. On the same day the act was passed organizing the Supreme Court of the state of Michigan, defining its jurisdiction, and prescribing the number, qualifications and tenure of office of its judges; from which act this court derives its existence and its powers. If, then, this court has any legal existence, the Detroit Young Men's Society is well incorporated.

The United States have repeatedly recognized the validity of the acts of the people of Michigan in forming a constitution and organizing a state government. They did so by admitting to their seats, although after some delay, a representative and two senators in congress for the state, elected in the latter part of the year 1835; and who held their offices during their respective terms of office, commencing at the date of their election, and not of their admission to their seats. Also, by "An act to establish the northern boundary line of the state of Ohio, and to provide for the admission of Michigan into the Union, upon the conditions therein expressed," approved June 15, 1836 (4 Story L. U. S., 2442), in which it is enacted,

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Scott v. Detroit Young Men's Society's Lessee.

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§ 2, that "the constitution and state government which the people *have formed* for themselves, be, and the same is hereby accepted, ratified and confirmed." The third, and also other sections of this act: "An act to provide for the due execution of the laws of the United States within the state of Michigan" (§§ 1, 2, 3), approved July 1, 1836 (4 Story's *L. U. S.*, 2456), and also "An act to admit the state of Michigan into the Union upon an equal footing with the original states," approved January 26, 1837 (4 Story's *L. U. S.*, 2531), all recognize the existence of the state of Michigan, although, at the date of their passage, she had not in fact been admitted into the Union by congress.

2. As to the existence of the board of governor and judges on July 1, 1836, with authority to execute the trusts conferred by the act of April 21, 1806 (2 Story's *L. U. S.*, 1025), which authorized and empowered the governor and judges of the territory of Michigan, to lay out a town on the site of the old town of Detroit and 10,000 acres adjacent, and to convey lots by donation and sale, he contended: 1. That this act was in the nature of a special commission, giving, to persons *designated*, merely by their titles of office, certain powers in relation to lands in Detroit, which had no connection with their powers or duties as governor or judges under the territorial government; and that whoever held the commissions from the general government, for the offices mentioned, might execute the trust conferred by the act, even though they had no executive or judicial functions to perform. 2. The fifth article of the schedule annexed to the constitution of the state of Michigan, provided that all officers, holding their offices and appointments in the territory under the authority of the United States, should continue to hold and exercise their respective offices and appointments, until superseded under said constitution. The territorial judges

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*Scott v. Detroit Young Men's Society's Lessee.*

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*Powell*, 6 *Wheat.*, 119; *Bush v. Williams*, 1 *Cooke*, 360; *Wilcox v. Jackson*, 13 *Pet.*, 498; *Bagnell v. Broderick*, 13 *Pet.*, 436. So, also, were the other decisions of the court, rejecting evidence offered by the plaintiffs, correct. The evidence offered was immaterial and irrelevant.

RANSOM, J., delivered the opinion of the court.

This case presents two very important questions for our determination; the first, involving the validity of the acts of our state government, and, in fact, the very existence of such government, prior to the admission of the state into the Union by congress, January 26, 1837; the second, involving the validity of the acts of the governor and judges of the territory of Michigan, between the time of the organization of the government of the state and her admission into the Union, while in the exercise of the powers conferred upon them by the "act to provide for the adjustment of titles to land in the town of Detroit and territory of Michigan, and for other purposes," approved April 21, 1806. The case also presents several other questions of minor importance, which will receive our consideration.

1. We shall first inquire whether Michigan was a *state*, with a constitution, and a government organized under it, possessing the sovereign power of state legislation, over the people within her limits, on the 26th day of March, 1836. If not, then the "act to incorporate the Detroit Young Men's Society," passed by a body claiming to be the legislature of such state, and approved by Stevens T. Mason as governor of such state, on the day last mentioned, was a nullity. It gave no vitality or powers to the defendants, as a corporation. They had no power to take and hold the real estate in question, or to sue for its recovery; and the court below erred, in permitting the act to

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*Scott v. Detroit Young Men's Society's Lessee.*

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be read in evidence to the jury, and in charging the jury, that the defendants were well incorporated under it.

The people of the former territory of Michigan, remained subject to the territorial government established by congress, until after they had acquired and exercised the right to organize a state government. That right was secured to them, on the happening of a certain future contingency, by the "ordinance of congress for the government of the territory of the United States northwest of the river Ohio," passed July 13, 1787.

Article 5 of the ordinance, provides for the division of the territory northwest of the river Ohio into states; and also that, "whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government." That the people of this division of the northwest territory, when it was found to contain sixty thousand free inhabitants, had a right to form a permanent constitution and a state government, is unquestionable. The right, and the power to form such a constitution and government, was as absolutely and irrevocably vested in, and secured to, the inhabitants of Michigan, by the compact contained in the ordinance of 1787, between the original states, and the people who then did, and who should thereafter inhabit the several divisions of the territory northwest of the river Ohio, as was the right of free government vested in and secured to, the whole people of the American Union, by the constitution of the United States. That right could in no way be modified or abridged, or its exercise controlled or restrained, by the general government, or by any other power whatever, unless it was done by the consent of the people themselves.

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Scott v. Detroit Young Men's Society's Lessee.

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Although, in the wording of this article of the ordinance, the "liberty to form a permanent constitution and state government," follows the grant of the right of such state, to "be admitted, by its delegates, into the congress of the United States," yet, it is evident that the formation of the state must, of necessity, precede such admission. The state must exist, before it can have delegates.

To gain admission in fact into congress, the new state must obtain the assent of that body—not because she does not possess a positive and unqualified right, under the ordinance, to such admission, on an equal footing with the original states, with her boundaries as defined and agreed to in that instrument—but, for the sole reason, that the older states represented in congress, who are the other party to the compact, have the physical power to refuse a compliance with the terms of an agreement, which they have deliberately made; and there is no third party, to which the state, the weaker party, can resort to coerce a fulfillment of the agreement.

No such assent, however, was necessary, to enable the people to convene, at such time and place, and in such manner, as they might determine upon, and erect for themselves a frame of government. The only condition necessarily precedent to the formation of such government, was the existence of sixty thousand free inhabitants within the prescribed limits of the state.

In view of their rights, the people, through their representatives in the legislative council of 1834, adopted measures to take an enumeration of the inhabitants. The enumeration was made; and it demonstrated that Michigan contained a population of over eighty thousand free inhabitants, and was therefore entitled to form a constitution and state government. Provision was then made for a convention of the people. They assembled, by their delegates, in convention, on the second Monday of May,

Scott v. Detroit Young Men's Society's Lessee.

1835. On the twenty-fourth day of June, of the same year, a constitution for the government of the state was ordained and established; and, in October following, it was fully ratified and confirmed by the people themselves. The constitution thus adopted, and the government which it established, were "republican, and in conformity to the principles contained in the ordinance" of 1787.

That Michigan contained the requisite number of free inhabitants to entitle her to a constitution and state government, that the people proceeded regularly in the formation of such constitution and government, and that they were republican, and in conformity to the principles of the ordinance of 1787, is not questioned by the plaintiffs' counsel. It is still contended, however, that Michigan was not a state, until admitted into the Union, and recognized as such by congress; but that she, in fact, remained subject to the territorial government prescribed by the laws of congress, until her admission into the Union, and that all her pretended legislation, as a state, under the constitution she had adopted, was utterly null and void.

There is nothing to be found in the original compact, the ordinance of 1787, which, in our judgment, favors this construction.

The people of the original states, at the termination of the revolutionary contest, found themselves overwhelmed with a debt, which they were unable to discharge. They were unwilling, and perhaps unable, to be taxed for its payment. For the purpose of providing the means to pay this debt, extensive tracts of land were ceded to the confederation, by Virginia and other states. These lands were an unclaimed wilderness, peopled only by savages, and consequently unproductive and valueless to the treasury. To induce their settlement and sale, was, therefore, an object of the first importance to the states; and, to

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*Scott v. Detroit Young Men's Society's Lessee.*

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effect this object, the terms of the compact contained in the ordinance of 1787, were proposed. The confederation, in that act, in effect said, to those who should emigrate to either division of the northwest territory, "If you will buy, reclaim, and settle our waste lands, and thus replenish our empty treasury, and, at the same time, protect our widely extended northwestern frontier from the incursions of the Indians, we will provide for your government, until your number shall reach sixty thousand; and then, you shall be at liberty to form a state government for yourselves, and shall be admitted into our union of states, on an equal footing in all respects with ourselves."

To this compact, the people who settled in the (now) state of Michigan, became a party, and entitled to insist on the fulfillment of its terms by the general government. When, in 1834, therefore, it was ascertained that the event had transpired, on the happening of which, the right of the people of Michigan to form a constitution and state government, was to vest, they were at liberty, at any time, to avail themselves of that right. The general government nowhere provided in the compact, that the people should obtain their assent, before they proceeded to form such government. If the people had the power to form a permanent constitution and state government, it follows that they possessed the power to put the various departments of such government into operation.

If it be said that the constitution and government should have been first submitted to congress, that it might be adjudged by that body whether they were republican and in conformity to the principles contained in the ordinance, it may be answered, that the confederation reserved to congress, only the right to determine the character of the constitution, when, after its adoption by the people, application should be made for admission into the

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Scott v. Detroit Young Men's Society's Lessee.

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Union. If the state constitution so formed should be found to be repugnant, in any of its provisions to the ordinance of 1787, or to the constitution of the United States, or to the laws of the United States made in pursuance thereof, it would, so far forth, be utterly null and void, and be so adjudged by the appropriate tribunals, the courts of justice.

The constitution and government, formed by the people of Michigan, was, then, authorized by the ordinance of 1787, and it was competent for the people to put such government in operation.

A legislature was duly organized in all its branches, and a governor elected, agreeably to the provisions of the constitution. The "act to incorporate the Detroit Young Men's Society," was passed by the legislature, and approved by the governor, according to the forms prescribed by the constitution. It was admissible in evidence on the trial, and it conferred upon the defendants, among other corporate franchises, the right to purchase, hold, and convey the real estate in question, and to sue for its recovery. There was, therefore, no error in the decision of the court admitting this act to be read in evidence to the jury, or in the instruction of the court to the jury that the defendants were well incorporated under it.

2. The next inquiry is, whether the governor and judges of the territory of Michigan were *in esse*, and had power to execute a valid conveyance of the premises in question, on the first day of July, 1836, the date of the execution of the deed from them to the defendants in error. If not, then the deed was void, and the defendants proved no title to the premises. The plaintiffs in error contend, that if the government of the state of Michigan was established prior to the execution of the deed, then the offices of governor and judges of the territory were thereby abrogated, superseded and annulled.

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*Scott v. Detroit Young Men's Society's Lessee.*

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We have before seen that the territory northwest of the river Ohio, was organized by the ordinance of 1787. The third clause of the first section, ordained that there should be appointed from time to time, by congress, a governor, whose commission should continue in force three years, unless sooner revoked, and that *he should reside in the district*. The fourth clause of the same section, provided for the appointment of a court, to consist of three judges, who should have a common law jurisdiction, and *reside in the district*, and continue in commission during good behavior.

The act of congress of January 11, 1805 (*Story's Laws U. S.*, 957), organized the territory of Michigan, and established for it a government, the same as that of the Indiana territory, having like officers, with like powers and duties.

By the act of congress of April 21, 1806 (2 *Story's Laws U. S.*, 1025), the governor and judges of the territory, or *any three of them*, were authorized to lay out a town, including the old town of Detroit, and 10,000 acres adjacent (except certain reservations); and were required to hear, determine, and finally adjust, all claims to lots therein, and give deeds for the same. They were required to donate lots of certain dimensions, to persons whose houses had been burned in the old town of Detroit June 11, 1805. It was further enacted by § 2, that, after satisfying claims provided for by the preceding section, the land remaining of the said 10,000 acres, should be disposed of by the *governor and judges aforesaid*, at their discretion, to the best advantage; and they were authorized to make deeds to purchasers thereof. They were further required to apply the proceeds of the land so disposed of, towards building a court-house and jail in the town of Detroit.

This act originated the land board of the governor and judges, from whom have proceeded the titles to lands (except the military reservations), in the old town of

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*Scott v. Detroit Young Men's Society's Lessee.*

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Detroit, and 10,000 acres adjacent. Under the authority conferred by it, the deed to the Detroit Young Men's Society was executed.

Was John S. Horner governor, and were Sibley, Morell and Wilkins judges of the territory of Michigan, with competent authority to execute this deed, on the day of its date, July 1, 1836?

It appears from the bill of exceptions, that it was proved by parol evidence on the trial, that Horner assumed, and was reputed to be acting as governor, and that Sibley, Morell and Wilkins were reputed to be and were acting as judges of the territory at that time.

An act of congress, approved August 7, 1789 (1 *Story's Laws U. S.*, 32), provided, that in all cases where, by the ordinance of 1787, officers were required to be appointed by congress, the president should nominate, and by and with the advice and consent of the senate, appoint such officers, who should be commissioned by him; and that he should have the same power of revocation and removal as, by the ordinance, was conferred upon congress. The appointment of governor was for three years, as previously established. Under this act Horner was appointed secretary, and became the acting governor of the territory in 1835, and assumed to act as such governor until after the execution of the deed in question. No evidence was offered to show his removal, or a revocation of his commission. He therefore continued in the office, legally exercising its functions, unless it was abolished by congress (which is not contended), or unless its powers were superseded and abrogated by the formation of a constitution and state government by the people of Michigan. Whether such was the effect of the formation of the state government we shall by and by consider.

The judges of the territory of Michigan were, by the ordinance of 1787, to hold their offices during good

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*Scott v. Detroit Young Men's Society's Lessee.*

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behavior. An act of congress, approved March 3, 1823 (*Story's Laws U. S.*, 1915) among other things, provides : " That the powers and duties of the judges of said territory (Michigan) shall be regulated by such laws as are or may be in force therein; and the said judges shall possess a chancery as well as common law jurisdiction. The tenure of office of said judges shall be limited to four years," etc., " provided, that nothing in this act contained shall be so construed as to deprive the judges of the territory of the jurisdiction conferred upon them by the laws of the United States." The same act, § 7, provides that from and after June 1, 1823, " there shall be but one clerk of the Supreme Court of the territory of Michigan, who shall perform all the duties of clerk of said court, whether sitting as a *Circuit and District Court*, or as judges of the territorial court;" and the following section provides for the adjustment of the accounts of John J. Deming, for his services as clerk of said *District and Circuit Court*.

*District and Circuit Court* powers were expressly conferred on the judges of the territories by an act of congress of March 3, 1805 (2 *Story's Laws U. S.*, 975); the first section of which enacts, that the Superior Courts of the several territories of the United States, in which a District Court has not been established by law, shall, in all cases in which the United States are concerned, have and exercise, within their respective territories, the same jurisdiction and powers which are by law given to, or may be exercised by, the District Court of Kentucky district ; and writs of error and appeals shall be from decisions therein to the Supreme Court (of the United States), for the same causes and under the same regulations as from the said District Court of Kentucky district." The following section of the same act, provides a compensation for marshals, clerks, attorneys and jurors,

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Scott v. Detroit Young Men's Society's Lessee.

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extending, with some exceptions, to such officers of the territorial courts.

An act of congress of February 19, 1831 (*Gord. Dig.*, § 520), goes still further, and provides that the District Court of the United States, for the district of Michigan (and also the District Courts of several other districts), "in addition to the ordinary jurisdiction and powers of a District Court, shall, within the limits of their respective districts, have jurisdiction of all causes, except appeals and writs of error, which now are, or hereafter may, by law, be made cognizable in a Circuit Court, and shall proceed therein in the same manner as a Circuit Court."

I do not find that these several acts of congress have been repealed. They were modified in some of their provisions, by the creation of distinct District and Circuit Courts, and the appointment of a district judge, after the admission of Michigan into the Union, January 26, 1837. It follows, that until that time, the judges of the Supreme Court of the territory of Michigan, possessed, as Circuit and District Courts of the United States, the same jurisdiction and powers, in all respects, as the same courts possessed, in any of the states; and their jurisdiction extended over the whole country then under the territorial government of Michigan, embracing Wisconsin, and a vast country west of it.

To enable the judges to exercise their powers as District and Circuit Courts, all the usual officers of these tribunals were provided, a district attorney, marshal, and collector of the revenue.

Under the authority of the act of congress of March 3, 1823, before cited (which, it will be recollectcd, authorized the territorial legislature of Michigan to regulate, by law, the powers and duties of the judges of the territory, providing, at the same time, that they should not have power to deprive said judges of the jurisdiction con-

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*Scott v. Detroit Young Men's Society's Lessee.*

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fferred upon them by the laws of the United States), the legislative council, at different times, made numerous provisions regulating and modifying the judicial system of the territory, as was thought expedient. The judges of the territory were, as a court, denominated the *Supreme Court*, by an act of the territorial legislature, and not by an act of congress. So the legislative council created a jurisdiction which was *entirely* local, styled the Superior Circuit Court, to be holden in the different counties of the territory, but by the same judges appointed by the president. Indeed, they possessed under the act of congress the most ample power to regulate all matters of purely local jurisprudence. There was a single limitation only, that they should not interfere with the jurisdiction conferred upon the judges by the laws of the United States.

The seventh section of an act of congress of April 18, 1818, providing for the admission of the state of Illinois into the Union (3 *Story's Laws U. S.*, 1676), was as follows: "All that part of the territory of the United States lying north of the state of Indiana, and which was included in the former Indiana territory, together with that part of the Illinois territory which is situated north of, and not included within, the boundaries prescribed by this act, to the state thereby authorized to be formed, shall be, and hereby is, attached to, and made a part of the Michigan territory, from and after the formation of the said state; subject, nevertheless, to be hereafter disposed of by congress, according to the right reserved in the fifth article of the ordinance aforesaid" (the ordinance of 1787); "and the inhabitants therein shall be entitled to the same privileges and immunities, and subject to the same regulations, in all respects, with the other citizens of the Michigan territory." The country thus attached to the territory of Michigan, continued to form a part of it, until the territorial government of Wisconsin was con-

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Scott v. Detroit Young Men's Society's Lessee.

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stituted, by an act of congress, approved April 20, 1836, which enacted, that, from and after the third day of July (then) next, all power and authority of the government of Michigan, in and over the territory thereby constituted, should cease (*4 Story's Laws U. S.*, 2426).

I have thus referred to the ordinance of 1787, and to the several acts of congress, which created the offices of governor and judges of the territory of Michigan, prescribed the tenure and defined the powers and duties of each respectively, and the territorial boundaries within which such powers might be exercised; and I have shown the general nature of the jurisdiction possessed by the judges, both as a District and Circuit Court of the United States, and as a strictly local tribunal for the administration of the laws of the territory.

Were the powers and duties of the governor and judges, such as we have seen them to be, under these various acts of congress referred to, superseded by the organization of the state government? And were these offices absolutely, and for all purposes, vacated and determined by that event?

If determined, at what time? The change, from a territorial to a state government, was not, and from necessity could not be, instantaneous. Indeed, our constitution itself contemplated that there could be no such sudden transition, for the fifth section of the schedule (of just as high authority as the constitution) declares, that "all officers, civil and military, now holding their offices and appointments in this territory, under the authority of the United States, or under the authority of this territory, shall continue to hold and exercise their respective offices and appointments, until superseded under this constitution." The act of the state legislature providing for the appointment of judges of the Supreme Court of the state, did not take effect, nor did such judges enter

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*Scott v. Detroit Young Men's Society's Lessee.*

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upon the term of their offices, until after July 4, 1836. The judges of the territory, therefore, continued to hold their offices, and to discharge the duties thereof, until after that time.

But, it may be said that they did so, under and by virtue of the state constitution. Be it so. They were still within the precise meaning and intent of the fifth section of the schedule; they were civil officers, holding their appointments under the authority of the United States. They had not been removed; their commissions had not been revoked by the president; nor had their powers and duties been superseded, or taken away, by any legislation of congress; and the people of Michigan had declared, by their delegates in convention, that they should continue to hold and exercise those very offices and appointments, until superseded by state officers of corresponding powers and duties. There is certainly much plausibility in this view of the case, but I do not rest the decision of this point upon ground merely plausible.

We may admit, that, upon the formation of the state constitution and government, all the powers of the governor of the territory were superseded, and could no longer be exercised within the geographical boundaries of the newly organized state; and we may admit further, that all the powers possessed and exercised by the judges of the territory, to which the *state* judges, under the constitution and laws of the United States could succeed, were taken from the former and transferred to the latter functionaries; were the offices of judges of the territory of Michigan, thereby terminated? To my mind, clearly not. The jurisdiction of the judges was abridged, but they nevertheless remained the judges of the same district of country as before the change of government. They still possessed plenary jurisdiction, as Circuit and District Courts of the United States, over the country called the

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Scott v. Detroit Young Men's Society's Lessee.

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territory of Michigan, as appears from the positive enactments of congress. That congress might confer those powers upon *three*, instead of *one*, or *two* judges, will not be questioned. Nor, will it be pretended, that any state authorities could, in any way, interfere with those courts, so as either to enlarge, diminish, or take away their jurisdiction, or confer any of their powers upon state tribunals. Suppose the same judges had been empowered by congress to exercise Circuit and District Court powers *only*. Would it have been contended by any one, that the change from a territorial to a state government, could have had the effect of determining their offices? If such would have been the effect of the change, under the circumstances supposed, upon the offices of judges, it must have had the like effect upon the offices of district attorney, marshal, and collector of the revenue; and why not upon the office of postmaster also? The state government had quite as much power to interfere with the transportation and delivery of the mails, and the collection of duties on imports, as with the offices of circuit and district judges, and the exercise of their powers and duties. Again, suppose there had been one judge of the territory of Michigan, instead of three judges, and he had been authorized to perform the duties of circuit and district judge only. Would the change of government have affected the tenure of his office? If not, does it vary the case, that congress deemed it expedient to associate three persons to perform those duties. It cannot be seriously pretended.

If it be said that Justices Morell, Sibley and Wilkins were judges of the Supreme Court of the territory of Michigan, and not judges of a district or circuit federal court, it may be answered, that the style of the court in no way affects the question under consideration. It was in the power of congress, to prescribe what style they

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*Scott v. Detroit Young Men's Society's Lessee.*

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chose, for the inferior courts created by them. But, it is to be remembered, no law of congress enacted that the judges should be styled judges of the Supreme Court. That style was given them by a law of the territory. By the ordinance of 1787, and the laws of congress, they were styled judges of the territory of Michigan, simply.

It seems to me clear, that these three judges had full power, at any time prior to the abolishment of their offices by express legislation of congress, to take effect on our admission into the Union, to have tried and determined offenses against the revenue laws, and post-office laws, infringements of patent-rights, and copy-rights, or any other matters within the jurisdiction of the Circuit and District Courts of the United States. Suppose it had been provided by our state constitution, that the Circuit Court of the United States for this district should constitute the Supreme Court of this state, and that the judge of the District Court should be the chancellor; and suppose the judges of these federal courts had consented to perform the duties of such state judges and chancellor; could it be said that the exercise of such jurisdiction would have vacated their offices, or in any way affected their powers and duties as judges of the Circuit and District Courts of the United States? Certainly not. And if the conferring of local state jurisdiction and powers upon the judges of these federal courts, could not have affected their jurisdiction and powers as federal judges, certainly, the circumstance that, by the organization of our state government, the jurisdiction which the judges of the territory previously possessed, as a territorial and local court, was entirely superseded, could not have affected, in any way, the jurisdiction which they possessed as Circuit and District Courts. •

But, if neither view which I have yet taken of this question be conclusive, there is still another aspect of it

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*Scott v. Detroit Young Men's Society's Lessee.*

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remaining to be examined, which, I think, must place it beyond all controversy. It will be kept in mind that, in 1818, the country west of lake Michigan, now constituting the territory of Wisconsin, was added to, and made a part of, the territory of Michigan, and so remained until after the third day of July, 1836. Now, if it were true, that the organization of the state government had the effect to divest the governor and judges, and all other officers within this peninsula, holding their offices and appointments under the authority of the United States, of all official power and authority, within the boundaries of the state, and if their offices were in so far superseded by that event, would they not still retain their offices, with the same official powers and duties as before, in that portion of the territory of Michigan, over which the state government did not extend? Was not John S. Horner governor, and were not Sibley, Morell and Wilkins judges, of the *entire* territory of Michigan—as well that part of it which was west of lake Michigan, and which remained subject to the territorial government until July 3, 1836, as that part which was east of the lake? Suppose these functionaries had all resided at Green Bay, or elsewhere west of lake Michigan, at the time the state government went into operation; would it have been urged by any one, that their official existence was terminated by that event, or that it, in the slightest degree, affected their powers or jurisdiction, otherwise than by reducing the geographical limits within which they could be exercised? I apprehend not; and, in my judgment, the judges would possess the same jurisdiction, over the same territory, as before, as judges of the Circuit and District Courts of the United States; and they would only be deprived of their jurisdiction over mere matters of local jurisprudence within the limits of the state.

But, suppose the western part of the territory had been

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Scott v. Detroit Young Men's Society's Lessee.

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erected into a state, instead of this peninsula. Would it have been contended, that the formation of such state government would have dissolved and terminated the territorial government here? Would it have occurred to any one that the offices of our governor and judges, and all others held under the general government, were vacated and superseded by that event? Unquestionably, never. Governor Horner, in such case, might rightfully have continued to perform the duties of chief executive officer of the territory of Michigan, and Judges Sibley, Morell and Wilkins, to have exercised their judicial functions by holding courts, as before.

I am unable to see the slightest distinction between the case last supposed, and the one under consideration. That the governor and judges usually resided at Detroit, instead of residing west of lake Michigan, does not make any material distinction in the cases; because the ordinance of 1787, which contains the only provision I have been able to find on the subject, simply declares, that they shall reside within their *district*.

That congress entertained the view we have taken of this subject is certain; for, by the act organizing a government for the territory of Wisconsin, it was provided, that the governor and secretary should, before they entered upon the discharge of the duties of their offices, each take an oath or affirmation, before some *judge* or justice of the peace, of the *existing territory of Michigan*; and a subsequent section of the same act declared, that the *existing laws* of the territory of Michigan should be extended over the newly created territory. This act was approved April 20, 1836; long after our state government was organized and in full operation.

From the foregoing considerations we are satisfied that John S. Horner was governor, and that the persons who executed the deed of the premises in controversy, were

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Scott v. Detroit Young Men's Society's Lessee.

judges, of the territory of Michigan, on the 1st day of July, 1836, the day of the execution of the deed, and that they had power to convey the premises.

3. But let us admit that this was not the case. Could the plaintiffs in error question the validity of the deed, on the ground that the grantors were not judges of the territory, because their offices had been superseded by the organization of the state government. At the time of its execution, the United States held the unqualified fee of the lot conveyed, and possessed the absolute right to dispose of it, as they should deem expedient. They had empowered the governor and judges of the territory, for the time being, to dispose of it, at their discretion, to the best advantage, by the act which we have before so often referred to. They appointed the persons who executed the deed to those offices, and their terms of office were unexpired at the time of its execution; and we think that by the acts of congress before referred to, they recognized those persons as incumbents of those offices, and the existence of the offices, at and subsequent to the time of such execution. If so, the plaintiffs in error cannot now be permitted to deny that there were such offices, or that the grantors held them; for, surely, if the principal recognize and affirm the existence and acts of an agent, a mere stranger cannot be permitted to controvert either.

We shall now briefly consider several questions of minor importance, which were raised at the trial and relied upon in the argument of this case.

4. It is contended, that the deed to the Detroit Young Men's Society is void, because the governor did not join with the judges in executing it.

As a general proposition, it is undoubtedly true, that where several persons are appointed to execute a power or trust, and no authority is given to a less number than the whole to act, all must join in its execution. A distinc-

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*Scott v. Detroit Young Men's Society's Lessee.*

tion is drawn, however, between a mere private trust or power, and a power of a public nature, conferred by law, in the execution of which, it is contended, that a majority have a right to act. If all are present to deliberate, although a majority only assent to the act, it is unquestionably sufficient: *Grindley v. Barker*, 1 *B. & P.*, 229, 236; *Rex v. Beeston*, 3 *T. R.*, 594; *Withnell v. Gartham*, 6 *T. R.*, 398; *Co. Lit.*, 181, b; *Rex v. Windham*, *Coupl.*, 377-9. And, in this case, in the absence of proof to the contrary, it will be presumed that the governor was present and consulted with the judges, touching the grant and conveyance to the Detroit Young Men's Society, of the lot in question. Where an act of public duty is enjoined, and has been performed in fact, the law will presume unless the contrary directly appears, that everything necessary to give it validity was observed in the performance: *Downing v. Rugar*, 21 *Wend.*, 184; *Math. Pres. Ev.*, 40.

But it appears to me that the language of the act of congress of April 21, 1806 (2 *Story's Laws U. S.*, 1025), is so explicit as to leave no room to question the validity of the deed, on the ground that it was not executed by the governor. Section 1 authorized the governor and judges, etc., or any three of them, to lay out the town of Detroit, adjust claims to lots therein, and give deeds for the same. Section 2 provided that the land remaining, after satisfying certain claims provided for in the first section, should be disposed of by the governor and judges *aforesaid*, at their discretion, who were authorized to make deeds to purchasers, and to apply the proceeds towards building a court-house, and jail, etc. Upon the ground of the difference observable between the phraseology of the first and second sections of the act, the former conferring powers upon the governor and judges, or any three of them, the latter upon the governor and judges *aforesaid*, the counsel for the plaintiffs in error, argued that there was a

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Scott v. Detroit Young Men's Society's Lessee.

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distinction between the powers conferred by the two sections; and that the powers conferred by the second section could not be exercised, without the concurrence of the governor and all of the judges. The word *aforesaid* is used relatively to what precedes it; and being a collective word, may refer to several matters, according to the intent; it is sometimes very extensively applied: *Dwarris on St.*, 771; 10 *Rep.*, 139. Here it manifestly refers to the persons described in the first section, just as they are there described; in other words, it is used to show that congress intended, by the second section, to confer the *same* powers upon the *same* persons in the sale of lands, which the first section conferred in *donating* them.

It was also insisted that the land board created by this act consisted of two integral parts, the governor and judges, and that no valid act could be done by one part without the concurrence of the other. We think this construction of the act cannot be sustained. The governor and judges were four persons designated by their names of office, to perform the duties contemplated by the act; their powers were the same, and might be exercised in the same manner, as though the members of the board had been designated and appointed by their respective names. The act clearly excludes the construction contended for, if we are right in the view we have taken, that the same persons were authorized to act under the second section, as under the first.

5. Another objection taken was, that the deed of the governor and judges was inadmissible in evidence, because it was not acknowledged by the judges who executed it. A sufficient answer to this objection is, that, under the statute in force when the conveyance was made (*Laws* 1832, p. 280), a deed, though not acknowledged, was good as against everybody except subsequent purchasers, or mortgagees, for a valuable consideration. It

Scott v. Detroit Young Men's Society's Lessee.

may be said further, that the word *deeds* as used in the act conferring power upon the governor and judges "to make *deeds* to purchasers," must be understood in its common law signification. At common law, a deed is a written instrument under seal. This definition embraces the conveyance in question.

6. Again, it is objected that parol evidence was admitted, to prove the official character of the persons who executed the deed. It is insisted that their commissions, or the record of their appointment, should have been produced, or their absence accounted for, before parol proof could be received. Such is not the rule of evidence. The proof offered, that they were reputed to be, and were acting judges of the territory of Michigan, was sufficient *prima facie*.

7. It is insisted also, that the court below erred in refusing to permit the plaintiffs in error to read in evidence the deed from the treasurer of Wayne county to Scott, executed October 10, 1833, in consummation of a sale of the lot in question, for the taxes of the year 1828. We have no doubt this deed was properly rejected. It was, at most, but evidence of the regularity of the treasurer's *sale*; and unaccompanied by proof that the taxes, for which the sale was made and the deed given, had been legally assessed and returned, and that all the proceedings anterior to the sale, had been in conformity to the statute, it did not tend to prove a title to the premises in the plaintiffs in error, or to disprove the title of the defendants.

8. The court below properly rejected, and excluded from the jury, the parol evidence introduced by the plaintiffs in error, to show that the premises in question were known as lot 52, prior to April 27, 1807; the resolution of the governor and judges offered in evidence to show an assignment of lot 52 to Elijah Brush as agent for Todd & McGill; the proof offered of the parol declarations of the

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Scott v. Detroit Young Men's Society's Lessee.

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governor and judges, made to the assessors of the city of Detroit, in the year 1828, that the lot in question had been conveyed and was subject to taxation; and also the proof offered that the records of the governor and judges had been inaccurately kept, and that many grants had been made, and deeds given, which did not appear from those records. This evidence was all wholly irrelevant and inadmissible.

The points of error raised upon the refusal of the court below to instruct the jury as requested by the plaintiffs in error, and, also, upon the instruction given by the court to the jury, have all been fully considered, in discussing the questions raised in the progress of the trial, as they appear in the bill of exceptions.

We are of opinion that there is no error in the record and proceedings of the court below, in this case. The judgment below must therefore be affirmed.

FELCH, J., did not participate in the decision, the cause having been argued before he took his seat upon the bench.

*Judgment affirmed.*

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Rossiter v. Chester.

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**Asher Rossiter and Charles G. Wicker v. John Chester and Henry T. Stringham.**

The steamer Missouri, being a new and seaworthy boat, and having on board passengers and a cargo of goods, on a voyage from Buffalo to Chicago, encountered a very severe gale on lake Huron. She was in great danger of perishing, from the violence of the wind and the roughness of the waves. After long struggling with the tempest, the master and crew agreed that it was necessary to lighten her, in order to save her with her freight and passengers. Accordingly, a quantity of goods were, for that purpose, thrown overboard by the crew. The boat was saved, though much injured, and returned to Detroit in safety, with the residue of her cargo. *Held*, That these facts would constitute a proper case, under the maritime law, for general average.

The maritime law is not in force over the lakes; or, in other words, they are not subject to admiralty jurisdiction, which is restricted to the open sea, and to waters navigable therefrom as far as the tide ebbs and flows. (a)

The doctrine of general average is known only to the maritime law, and cannot be enforced in a court of common law jurisdiction. (b)

Freight *pro rata itineris* is due, when the ship, by inevitable necessity, is forced into a port short of her destination; and is unable to prosecute the voyage, and the goods are there voluntarily accepted by the owner.

The owner of goods was deemed to have voluntarily accepted them at the intermediate port, when, knowing that the voyage had been abandoned, its further prosecution having become impossible, or extremely hazardous, he there demanded his goods from the agents of the forwarders, with whom they were stored, tendering payment of their charges for storage, and brought replevin to recover possession, on the refusal of such agents to deliver them.

This was an action of replevin to recover possession of certain goods, wares and merchandise, tried in Wayne Circuit Court, at the November term, 1841, before the Hon. GEO. MORELL, presiding judge, who reserved the

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(a, b) Overruled, *Backus v. Coyne*, 35 Mich., 5. It is now the well settled American doctrine that admiralty jurisdiction is not limited in this country to tide waters, but extends to the lakes and waters connecting them: *The Eagle*, 8 Wall., 15; *The Flora*, 1 Biss., 29.

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Rossmier v. Chester.

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questions arising upon the facts found by the special verdict, for the opinion of this court thereon.

The jury found specially, "that the steamer Missouri, Captain Thomas Wilkins, master, was regularly enrolled and licensed for the purpose of carrying on domestic trade between the port of Buffalo, on lake Erie, in New York, and the port of Chicago, on lake Michigan, in Illinois, and intermediate places, and was employed in that business in the year 1840, and before and since.

"That the plaintiffs had shipped from the city of New York, certain goods, wares and merchandise, to be forwarded by the route of the Erie canal and the lakes, to Chicago, on lake Michigan. The goods were to be delivered at the latter place. In the month of October, 1840, they were shipped at Buffalo, on the Missouri. The bill of lading, and the contract with the forwarders at New York, contained an exception in the ordinary form, 'dangers of the lakes excepted.' This is generally, and almost universally, a part of the contract for the forwarding of goods by the lakes.

"That the Missouri was a new boat, and *seaworthy*. On her way up, with the goods of the plaintiffs and others on board, in lake Huron, on or about the 23d day of October, she encountered a very severe gale. She was in danger of perishing, from the violence of the wind and the roughness of the waves. After long struggling with the tempest, and being in great danger of perishing, the master and crew agreed that it was necessary to lighten the boat, in order to save her with her freight and passengers; accordingly, a quantity of goods were *thrown* overboard by the crew, in order to lighten the boat, and save her with the remainder of her freight and the passengers and crew. The boat was saved, and got back in safety to Detroit. The freight was there landed; and, as the close of navigation was at hand, and the vessel much injured, the voyage

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*Rosmier v. Chester.*

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was abandoned. A protest and full statement were made by the captain immediately on her return to Detroit. The plaintiffs had notice of these facts, and that the goods were in the custody of the defendants as the agents of the forwarders and shippers.

"That the plaintiffs offered to accept the goods and to pay to the defendants their charges for storage, etc., at Detroit. The defendants accepted and were paid these; but demanded, also, the charges and expenses for freight, etc., to Detroit; being the amount advanced on the goods at Buffalo, for canal charges, and a ratable freight to Detroit. The defendants also insisted that the plaintiffs should agree to be responsible for contribution towards the goods thrown overboard, and the damage to the vessel, etc., on the principle of general, or gross average. This the plaintiffs refused; and refused to execute a general average bond, in the ordinary form, which was tendered to them, and the execution of which was demanded by the defendants as a condition precedent to the delivery of the goods. The plaintiffs then replevied the goods in the present action."

*George C. Bates*, for the plaintiffs, admitted that the facts would have constituted a proper case for gross or general average, had they occurred at sea; but he insisted:

1. That general average, is known to the maritime law alone: *Jac. L. D. Average*; *Lex Mer.*, 119, 123; *Lex Mer. Am.*, 236; *Ab. Sh.*, 342, 348, 344; 4 *Bl. Com.*, 64; 1 *Bac. Abr.*, 631; 3 *Kent's Com.*, 233; 2 *Gall.*, 475; *Dunl. Adm. Pr.*, 57; 2 *Marsh. Ins.*, 534, 537; and has never been recognized or enforced by courts of common law jurisdiction merely: 12 *Cb. Rep.*, 63; *Birkley v. Presgrave*, 1 *East.*, 220; *Cowell v. Edwards*, 2 *B. & P.*, 269, 270, 274; *Marsh. Ins.*, 534. If enforced or known at all, elsewhere than in courts of admiralty and maritime juris-

*Rossiter v. Chester.*

diction, it can only be in courts of equity: *Deering v. Earl of Winchelsea*, 2 *B. & P.*, 274; *Craythorne v. Swinburne*, 14 *Ves.*, 169; *Campbell v. Mesier*, 4 *Johns. Ch.*, 333, 339.

2. The maritime law applies only to matters arising at sea, and on waters navigable from the sea as far as the tide ebbs and flows, and not upon lakes or navigable rivers, above the ebb and flow of the tide: *Case of Steamboat Thomas Jefferson*, 10 *Wheat.*, 428; *S. C.*, 6 *Cond.*, 173; *Steamboat Orleans v. Phæbus*, 11 *Pet.*, 175; *Gilp.*, 529, 205.

If these positions are correct, the goods in this case were not liable to contribution upon the principle of general average.

3. But, if the maritime law is to be applied upon the lakes, then the defendants' claim or lien for average, can only be enforced in the courts of the United States, which have exclusive jurisdiction over all maritime causes. The proper mode of ascertaining and enforcing it, would be by libel in the District Court of the United States: 2 *Gall.*, 455; *Dunl. Adm. Pr.*, 57.

4. The defendants were not entitled to a lien for the freight *pro rata*; the goods never having been accepted by the plaintiffs voluntarily: *Ab. Sh.*, 303, 329, note; *Marine Ins. Co. v. United Ins. Co.*, 9 *Johns.*, 186; *Welch v. Hicks*, 6 *Cow.*, 504; *Center v. American Ins. Co.*, 7 *Cow.*, 564; *Hurton v. Union Ins. Co.*, 1 *Wash. C. C.*, 530; 5 *Binn.*, 525; 2 *Serg. & Rawle*, 229; *Catlett v. Colum Ins. Co.*, 12 *Wheat.*, 883.

*T. Romeyn*, for the defendants:

1. This is a proper case under the *maritime law* for general average: *Ab. Sh.*, 342, 343, 344; 3 *Kent's Com.*, 233, 234; 8 *Mass.*, 467; 1 *Caine's*, 196; 4 *Dall.*, 459; 2 *Serg. & Rawle*, 229; 6 *Mass.*, 125.

2. The maritime law is in force on the lakes; or, in other

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Rossiter v. Chester.

words, they are subject to admiralty jurisdiction. Every District Court of the United States possesses all the powers of a court of admiralty: *Glass v. The Betsey*, 3 *Dall.*, 6; 1 *Cond.*, 10. All *maritime* contracts are within the jurisdiction of the admiralty courts: *De Lovio v. Boit*, 2 *Gall.*, 471, 472, 474; *Plummer v. Webb*, 4 *Mason's*, 380, and cases cited in 1 *Kent's Com.*, 370. As to what are *maritime* contracts, see *De Lovio v. Boit*, 2 *Gall.*, 475; *Dunl. Adm. Pr.*, 43; *Strong v. N. Y. Firemen's Ins. Co.*, 11 *Johns.*, 328; *Ramsay v. Allegro*, 12 *Wheat.*, 615; 3 *Kent's Com.*, 244. See also cases cited in *Gord. Dig.*, 145, notes.

Was the contract of shipment in this case, a *maritime* contract? When the voyage is wholly on rivers, and above tide waters, it is admitted that the service is not *maritime*: 11 *Pet.*, 183; 7 *Pet.*, 344; 10 *Wheat.*, 428; 6 *Cond.*, 174. But the lakes are different. The dangers of navigation are similar to those attendant on the navigation of the ocean. They form the boundary between foreign governments and ours.

By the English common law, admiralty jurisdiction was restricted to the open sea, and to rivers as far as the ebb and flow of the tide, on the principle that these marked the bounds and limits of counties, and of individual ownership in the soil covered by the water: 1 *Kent's Com.*, 367; 1 *Hale's P. C.*, 424; 3 *Inst.*, 133; *Constable's Case*, 5 *Coke*, 106; *United States v. Grush*, 5 *Mason*, 290; *De Lovio v. Boit.*, 2 *Gall.*, 427. Above the ebb and flow of the tide, the county or state jurisdiction attached, to the exclusion of the admiralty, and the civil rights of riparian proprietors were different. The high seas, without the county, were subject to the *exclusive* jurisdiction of the admiralty: On bays, havens, creeks, etc., within the county, the common law and admiralty had a *concurrent* jurisdiction: 1 *Kent's Com.*, 367. The English rivers

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Rossiter v. Chester.

are not navigable above tide waters; and in *Shrunk v. Schuylkill Navigation Co.*, 14 *Serg. & Rawle*, 79, the applicability of the common law of England, even as to rivers, was denied. Granting, however, that our rivers are subject only to the common law, the lakes are entirely different. Riparian proprietors own to the middle of the stream, under a grant bounded by the water's edge: 6 *Cow.*, 547; 3 *Kent's Com.*, 429, n. (a); 24 *Wend.*, 453. Not so with the proprietors of land bounded by the shore of lake Erie, or of any of the great lakes. The soil under the waters of the lakes belongs to the public; and, as the limits of admiralty jurisdiction in England are the same as those of individual ownership of land covered by water, we infer the impropriety of applying the rules of the English common law to lakes like these.

Whether admiralty jurisdiction extends over the lakes, is still unsettled. How ought this question to be settled upon principle? As to the measure of admiralty jurisdiction, see 2 *Gall.*, 469, 470, 471, n. 47. The application of this jurisdiction must depend upon, and be modified by circumstances: 2 *Gall.*, 469, 470; *Pet. Adm. Dec.*, 233. This is the general doctrine as to all the common law. We have adopted it only so far as it is suitable to our situation: 1 *Kent's Com.*, 472, 473. What is expedient and suitable here? Foreign commerce may be transacted on these lakes. They separate us from foreign powers. In times of war, prize questions may arise. In times of peace, crimes may be committed, which would otherwise go unpunished from the difficulty of conviction at common law. Questions of salvage must arise. Contracts of affreightment, in their objects and incidents, are here similar to such contracts upon the ocean. And it is therefore contended, that admiralty jurisdiction extends to the lakes, concurrently with that of the common law.

3. If the maritime law applies to this case, a court of

*Bomiter v. Chester.*

common law will apply its principles, and take jurisdiction of the matter : *2 Gall.*, 398; *Dunl. Adm. Pr.*, 19.

But the defendants do not seek to *enforce* the average in this case. They act on the defensive, and merely assert a right to retain the goods until the average is adjusted—they care not by what tribunal.

4. The doctrine of general average is one which exists, and may be enforced at common law, in cases to which the admiralty jurisdiction does not extend. It is an incident to the contract of bailment for the carriage of goods. There is no difference between carriers by land and by water, or between those by inland waters, and on the ocean : *Story on Bailm.*, 322, 323, and n. 1; *2 Kent's Com.*, 599, 600. They are all common carriers. In a case of necessary jettison, a carrier by water is not responsible : *Jones on Bail*, 108; *2 Kent's Com.*, 604; *McArthur v. Sears*, 21 *Wend.*, 195; 12 *Coke*, 63. If then A's goods are sacrificed for the benefit of B and C, these latter are bound at common law to contribute : 1 *Story on Eq.*, 468; *Deering v. Winchelsea*, 2 *B. & P.*, 270; 2 *Com. Dig.*, 536, 569; *Hugh. Ins.*, 285; *Mouse's Case*, 12 *Coke* 63; *Birkley v. Presgrave*, 1 *East.*, 220; *Simonds v. White*, 2 *Barn. & Cress.*, 805; *Campbell v. Mesier*, 4 *Johns. Ch.*, 886; *Story on Bail.*, 271, 272; *2 Kent's Com.*, 564, 565; *Gazzam v. Cincinnati Ins. Co.*, 6 *Ohio Rep.*, 88; 4 *Binn.*, 130.

5. The goods in this case were chargeable with ratable freight : *Luke v. Lyde*, 2 *Burr.*, 885; *Park. Ins.*, 70; *Hooe v. Mason*, 1 *Wash.*, 207; *Dorr v. New England Marine Ins. Co.*, 4 *Mass.*, 221, 281; *Coffin v. Stoner*, 5 *Mass.*, 252; *Portland Bank v. Stubbs*, 6 *Mass.*, 422; *Welsh v. Hicks*, 6 *Cow.*, 510; 8 *Kent's Com.*, 228, 229.

WHIPPLE, J., delivered the opinion of the court.

The facts found by the special verdict present the following questions of law for our consideration :

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Rosister v. Chester.

1. Do they constitute a case under the *maritime law* for general average? And if they do, then,

2. Is the maritime law in force upon the lakes over which the goods were to be transported?

3. If the maritime law applies to this case, will a court of common law apply its principles, and take jurisdiction of the matter?

If the maritime law is not in force upon the lakes, and is inapplicable to the case, then,

4. Is the doctrine of general average, one which exists and may be enforced at common law?

5. Were the defendants entitled to a lien upon the goods for freight *pro rata*, according to the proportion of the voyage performed?

These questions will be considered in the order in which they are stated.

1. "General, or gross average, is the contribution to be levied from each person having property at hazard in a sea voyage, whether the ship itself, the freight, or cargo, for indemnifying the person whose property has been advisedly sacrificed for the general safety, against any greater share of the loss than others sustain :" 2 *Bell's Com.*, 142. Such is the clear and concise definition given by Bell, in his commentaries on the laws of Scotland, and it agrees substantially with that given by other authors, ancient and modern. Chancellor KENT says, that "it is one of those rules of the marine law, which is built upon the plainest principles of justice, and has accordingly recommended itself to the notice and adoption of all the commercial nations of the world:" 3 *Kent's Com.*, 283. It is derived substantially from the famous Rhodian law *de Jactu*, and it seems to have excited especial wonder and admiration, that a rule so perfect in policy and justice, should be found in the most ancient code of maritime law.

"Two things are necessary to found the right to contri-

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Rossmere v. Chester.

bution: 1. That the property shall have been advisedly sacrificed for the common safety. 2. That such sacrifice shall have preserved the property of those concerned." 2 *Bell's Com.*, 143: The facts in this case justified the jettison, and it appears to have been made advisedly; it was the means, also, of preserving the property of others. The case, then, is a proper one for general average under the *maritime law*.

2. Is the maritime law in force upon the lakes over which the goods were to be transported? This question could not be advisedly settled without a more extended examination, than the time at my command will enable me to make, into the nature and history of the maritime code, which had its origin in remote antiquity, which resisted the assaults of powerful opponents, which embodies so much wisdom and justice, and which has exerted so benign an influence upon man as a civilized being. The ancient jurisdiction of the admiralty is involved in much doubt and obscurity, but it is clear that it took "cognizance of questions of prize; of torts and offenses, as well in ports within the ebb and flow of the tide, as upon the high seas; of maritime contracts and navigation;" "of all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison," etc.: *De Lovio v. Boit*, 2 *Gall.*, 400.

Mr. Justice STORY, in pronouncing the opinion in that case, in support of the jurisdiction of the admiralty, entered into a very minute and critical examination of those ancient records which have come down to us from a remote antiquity, and traced, with great learning and fidelity, the various laws and ordinances which were adopted in England, from time to time, enlarging, restraining, or modifying the jurisdiction of the admiralty, quoting freely from the Black Book of the admiralty, the laws of Oleron compiled by Richard I., the several ordinances in the reigns

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Roeister v. Chester.

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of John and Edward I., and records in the reign of Edward III., who gave to the laws of Oleron their final confirmation.

An ordinance in the reign of Edward I. declared, "that every contract between merchant and merchant, or merchant and mariner, *beyond sea, or within the flood-mark*, should be tried before the admiral, and not elsewhere;" and, at a convocation of all the judges of the realm, in the reign of Edward III., the jurisdiction of the admiralty was vindicated and preserved. The Black Book, which contained the laws of Oleron, is deemed by Judge STORY to be of the highest authority; and in it we find the jurisdiction of the admiralty extending to torts, etc., arising upon the *high seas, and to ports within the ebb and flow of the tide*. A reference, also, to the commissions of the judges, in this and the preceding reigns shows, that their jurisdiction extended to maritime transactions upon the *high seas alone*. Judge STORY further remarks, "that this jurisdiction was, from its original establishment, *exclusive* of the courts of common law in all cases, may, perhaps, admit of some doubt;" "but that there is any authority previous to 13 Rich. II., which, properly considered, impeaches the jurisdiction of the admiralty, as here asserted, may be with some confidence denied." The history of the war made by Lord Coke upon the jurisdiction of the Courts of Chancery and Admiralty, is well known to the legal student, and how much credit is to be awarded to him in his effort to impugn the jurisdiction of those courts, may be gathered from a remark which fell from the lips of that eminent lawyer, Mr. Justice Buller, who said, that, "with respect to what is said relative to the admiralty jurisdiction in 4 Inst., 135, that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against that jurisdiction." In the memorable con-

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Rossiter v. Chester.

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test in the time of Lord Coke, respecting the jurisdiction of the admiralty, the views of that learned judge may be gleaned by reference to his 4th Institute. They are attempted to be sustained by a series of cases which are there cited, all of which are met, and the inferences he seeks to establish successfully refuted, by Justice STORY, in the case of *De Lovio v. Boit*.

But it was principally on the statutes of 18 Rich. II., 15 Rich. II., and 2 Hen. IV., that the controversy respecting the admiralty was kept up for more than two centuries. On the part of the admiralty it was maintained, that those statutes never intended to abridge their jurisdiction; but that it extended: 1. Over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide. 2. Over all maritime contracts arising at home or abroad. 3. Over matters of prize and its incidents. On the other hand, the courts of common law held, that the jurisdiction of the admiralty was confined to contracts and things, exclusively, made and done upon the high seas, and to be executed upon the high seas; and that it had no jurisdiction over torts, offenses, or injuries, done in ports within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor of contracts made upon the high seas to be executed upon land. With this controversy in its progress and termination, I have nothing to do, as the simple object in noticing it, was to show, that the maritime code is applicable to the *high seas, and to ports within the ebb and flow of the tide*. It seems admitted, however, "that the courts of common law, in England, by a silent and steady march, have extended the limits of their own authority, until they have usurped or acquired concurrent jurisdiction over all cases, except of prize, within the cognizance of the admiralty:" 2 Gall., 422. At first, they disclaimed all cognizance of things done *without* the bodies of the counties of the realm; and even over

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Rossiter v. Chester.

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collateral matters done out of the realm, which came incidentally in question, upon issues regularly before the courts. "Finally, after much hesitation and doubt, by the use of a fiction, often absurd, and never traversable, they held cognizance over all personal causes arising on the high seas, or in foreign realms, without any regard to the place of their transaction or consummation." "Upon what principles of the ancient common law, this extension of jurisdiction" (says Justice STORY) "can be supported, it is difficult to perceive." It would not be uninteresting here, to consider the reasons upon which the courts of common law insisted that the admiralty was excluded from jurisdiction in ports and havens, but no valuable result can be attained by prosecuting this inquiry, as the reasons given, are based upon the construction of several English statutes, and not upon the ancient common law.\* I shall conclude this brief review of the question of jurisdiction, by quoting from Sir H. Spelman. He says: "The place absolutely subject to the jurisdiction of the admiralty, is the sea, *which seemeth to comprehend public rivers, fresh waters, creeks, and surrounded places whatsoever, within the ebbing and flowing of the sea at the highest water.*"

Let us now recur to the constitution of the United States, the acts of congress, and the decisions of our own courts, to see how far the principle laid down by Spelman, and sustained by Lord Hale, is supported. To the courts of the United States, the constitution has delegated the power to take cognizance "of all cases of admiralty and maritime jurisdiction;" and an act of congress has given to the District Courts of the United States, "cognizance of all civil causes of admiralty and maritime

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\*One of those statutes, viz: The statute of 15 Rich. II., ch. 3, expressly prohibits the admiralty from taking cognizance of "all manner of contracts, pleas and querels, and all other things, done or arising within the bodies of counties, as well by land as by water." In respect to the true construction of which, there was a great conflict of decision.

*Rositer v. Chester.*

jurisdiction, including all seizures under laws of impost, navigation or trade, of the United States, where the seizures are made on waters *navigable from the sea*, by vessels of ten or more tons burden, within their respective districts, as well as upon the *high seas*."

The first case I refer to, is that of *Steamboat Orleans v. Phœbus*, 11 Pet., 175, heard on appeal from the District Court of the district of Louisiana. Phœbus, who was the owner of one-sixth part of the steamboat Orleans, filed a libel on the admiralty side of that court, against Forsyth and others, who were the owners of the other five-sixths parts of the boat, alleging himself to be a part owner and master of the boat, and that he had been dispossessed by the owners, who were navigating, trading with, and using the boat contrary to his wishes; that he wished to have an amicable sale of the boat, but the other owners refused, and were about to send her up the Mississippi on another trip; that the boat then lay at New Orleans, within the ebb and flow of the tide, and within the admiralty jurisdiction of the court. He therefore prayed admiralty process against the boat, and that she might be sold, and one-sixth part of the proceeds be paid to him, etc. The claimants and owners of the five-sixths of the boat, admitted the title of the libelant, but denied the jurisdiction of the court, alleging, that the boat did not navigate waters where the tide ebbs and flows; and further, that she was not a maritime boat, and was never intended to navigate the seas. It was stated in argument by counsel, that the principal reason for bringing the case before the Supreme Court, was to obtain the judgment of that tribunal upon the question of jurisdiction which was raised. Mr. Justice STORY, in delivering the opinion of the court, says: "There is no doubt that the boat was employed exclusively in trade and navigation upon the waters of the Mississippi, and its

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Rossiter v. Chester.

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tributary streams; and that she was not employed or intended to be employed in navigation or trade on the sea, or on tide waters." "Though in her voyages she may have touched at one *terminus* of them, in tide waters, her employment has been, substantially, on other waters." "The true test of jurisdiction in all cases of this sort, is, whether the vessel be engaged, substantially, in maritime navigation; or in interior navigation and trade, *not on tide waters*. In the latter case there is no jurisdiction." This decision seems to me to be conclusive against the defendants upon the first proposition. The case is a strong illustration of the principle, that the maritime law applies exclusively to things done upon or relating to the sea; for it is to be noted that the boat touched, at one *terminus* of her voyage, *in tide waters*. It is admitted by the counsel for the defendants, that when the voyage is wholly on rivers, and above tide waters, the service is not maritime; but it is insisted with much force and great reason, that the rule which prevails in respect to such rivers, is inapplicable to *the lakes*. We have not been insensible to the reasoning upon which the distinction is founded, nor have we failed to give to it the most deliberate consideration. It is admitted that the dangers attendant on the navigation of the sea, are also attendant on the navigation of the lakes; that these lakes constitute the national boundary line between this country and the most powerful maritime power in the world; and that the same reasons exist, for applying to vessels engaged in navigating the lakes, the wise and equitable provisions which are to be found embodied in the maritime code, which exist for their application to vessels navigating the ocean. We have, also, well considered the English rule, and the reasoning and principles upon which it is based, that the admiralty jurisdiction was restricted to the open sea, and *to the rivers as far as the ebb and flow of the tide*; and we are free to say,

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Rossiter v. Chester.

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that if the question could be regarded as an original one, if we did not feel trammelled by the uniform current of decisions in the courts of the United States, we should be strongly inclined to apply the maritime law to the lakes. But, as it is, we must bow to the rule which is universally recognized by elementary authors, and the decisions of judicial tribunals, that the maritime law applies to *tide waters* alone. We feel bound to yield to that policy which teaches us, that in respect to the commerce and navigation of the United States, and indeed upon all questions involving principles of national and constitutional law, uniformity of rules and decisions, is of the highest importance, and that consequences of the most serious nature would result from a conflict of decision between the federal and state courts. The former having rejected the decisions of the courts of common law, founded upon the various English statutes which have been noticed regarding those decisions as often contradictory, and rarely supported by any consistent principle, we must also reject them: 2 *Gall.*, 472. They have so construed the constitution, as to embrace all those cases, which *originally and inherently* belonged to the admiralty, before any statutable restriction: 2 *Gall.*, 473. Mr. Justice WINCHESTER says: "The doctrine that would extend the statutes of Richard to the present judicial power of the United States, seems little short of an absurdity." And Mr. Justice STORY remarks, that "there are decisions of the courts of the United States, which completely establish the proposition that the statutes of Richard, and the common law construction of them, do not attach to that clause of the constitution conferring admiralty and maritime jurisdiction upon the courts of the United States; and that, notwithstanding the courts of common law held, that the admiralty had no jurisdiction of things done within the ebb and flow of the tide, *in ports, creeks and havens*, yet, it has been repeat

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*Rossiter v. Chester.*

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edly and solemnly held by the Supreme Court, that all seizures under laws of impost, navigation and trade, in waters navigable from the sea by vessels of ten or more tons burden, *as well within the ports and districts of the United States, as upon the high seas*, are causes of admiralty and maritime jurisdiction." This limitation as to the place of seizure, it is true, is prescribed by act of congress; but it is quite clear that congress had no authority to include cases within the admiralty jurisdiction, which the terms of the constitution did not warrant. The courts of the United States having rejected the doctrines laid down by the courts of common law in England, we cannot, therefore, refer to them as rules of decision in this court. We are not permitted to adopt such interpolations upon the maritime code, as the courts of common law have sought to make, in order to save to "lords, cities and boroughs, their liberties and franchises;" to do which, controlled, to a considerable extent, the decisions of those courts abridging the rights of the admiralty.

3. The conclusion to which we have come upon the second question presented by this case, in effect, determines the third; which is, whether, *if the maritime law applies to this case, a court of common law will apply its principles and take jurisdiction of the matter?* Having determined that the maritime law is inapplicable to this case, we cannot, consequently, apply its principles.

4. But it is contended, in the fourth place, that the doctrine of general average is one which exists, and may be enforced at common law, in cases to which the admiralty jurisdiction does not extend; that it is an incident to the contract of bailment. To support this position, numerous authorities have been cited by the counsel for the defendants. As they are all of the same general character, and sustain the same general rule, an examination of one or two will be sufficient, to show how far they go to recog-

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Rossiter v. Chester.

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nize the principle, so ably and strenuously insisted upon in argument.

Mouse's Case, reported in 12 *Coke*, 68, will be first examined. The facts were as follows: "The ferryman of Gravesend took forty-seven passengers into his barge, to pass to London, and Mouse was one of them, and the barge being upon the water, a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger to be drowned, if a hogshead of wine, and other ponderous things, were not cast out, for the safeguard of the lives of the men." Mouse brought an action of trespass, and upon proof of the above facts, a nonsuit was directed. It is very clear that this case does not support the principle to the extent contended for. All that can be claimed for it is, that the courts of common law will notice the maritime law and apply its principles, when those principles arise, incidentally, in the course of a trial in the common law courts. But it is apprehended, that if, in that case, the court had been called upon, not only to recognize the fact that there was a necessary jettison, which justified the defendant, but also to make contribution according to the rules prescribed by the law maritime, a different result would have followed.

The case of *Simonds v. White*, 2 *Barn. & Cress.*, 805, in no wise supports the rule. It was an action of *assumpsit*, brought to recover back money paid by the plaintiff to the defendant, at St. Petersburgh, as a contribution to a general or gross average, settled according to the Russian law. The only question in the case was, whether the plaintiff could recover back the difference between the amount thus paid, and the amount he would have been obliged to pay, on an adjustment of average made according to the law of England. The court having determined that the place of destination was the place at which the average should be adjusted, gave judgment for the defendant on the case

*Rosmire v. Chester.*

made. Chief Justice ABBOTT, in delivering the opinion of the court, remarks, that the obligation to contribute depends upon a general principle of *maritime law*; and further, that "the shipper of goods, tacitly, if not expressly, assents to general average, as a known *maritime usage*."

The case of *Gazzam v. Cincinnati Insurance Co.*, 6 Ohio, 33, was an action of *assumpsit* on a policy of insurance. A special verdict was found, which specified the particular items of loss, and among these items appears the following: "The boat's average on jettison of cargo, \$724.84." The question presented for the consideration of the court was, whether the several items mentioned in the verdict, were, in point of law, chargeable under the policy. With respect to the particular item for average, the difference between the counsel arose upon the true construction of the policy of insurance, and not upon the authority of the court, to take cognizance of cases in which the doctrine of average was raised, and when that power was invoked to direct a contribution according to the rules prescribed by the maritime law. Such a decision, thus made, in which the question of jurisdiction was not even suggested, much less discussed, can have but little weight. Without analyzing the other cases referred to by counsel in argument (all of which have been carefully examined), we feel bound, though reluctantly, to declare, that the doctrine of average is known only to the maritime law, and cannot, therefore, be enforced in a court of common law. This conclusion was, indeed, a necessary consequence of the views taken by us in the discussion of the principal question involved in this case; and we are strongly confirmed in the correctness of that conclusion, by the consideration that, with exception of the case of *Gazzam v. Cincinnati Insurance Co.*, no authority can be found asserting a contrary doctrine, where the jettison was not on tide waters. Another insuperable

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Rossiter v. Chester.

objection to the jurisdiction of courts of common law, in questions of average, arises from the fact, that it would be exceedingly difficult for such tribunals to adjust the interest which is involved in the common calamity. The parties interested in the proceeding, may be five or five hundred. The owners of the ship, and the freight, and the cargo, have each a separate, and often adverse interest to each other, and it may be readily imagined what embarrassment would necessarily follow an adjustment of such adverse interests in a court of law. Mr. Justice STORY (*Story on Eq.*, § 491) presents, in a strong light, the objections to such an assumption of jurisdiction. He says that, "in a proceeding at the common law, every party having a sole and distinct interest must be separately sued; and as the verdict and judgment in one case would not only not be conclusive, but not even be admissible evidence in another suit, as *res inter alios acta*; and as the amount to be recovered must in each case depend upon the value of all the interests to be affected, which, of course, might be differently estimated by different juries; it is manifest, that the grossest injustice, or the most oppressive litigation, might take place in all cases of average on board of general ships." These difficulties are all obviated by a recourse to those courts whose proceedings are regulated by the course of the civil law. The simplicity and equity of the rules which prevail in such tribunals, render them eminently safe, convenient, and expeditious, in cases of this nature.

5. I shall now briefly consider the last question raised by the special verdict, and that is, whether the defendants were entitled to a lien for freight *pro rata*?

There are two cases in which the right to ratable freight arises: 1. When the ship has performed the voyage, and has brought only a part of her cargo to the place of destination; 2. When she has not performed her whole voy-

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Rosster v. Chester.

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age, and the goods have been delivered to the merchant, at a place short of the port of delivery. In the case of a general ship, freight is due for what is delivered, the contract being, in its nature, divisible; but if a ship be chartered at a specific sum for the voyage, and she loses part of her cargo by a peril of the sea, and conveys the residue, it has been a question, whether the freight could be apportioned: *3 Kent's Com.*, 227. The weight of authority, says Chancellor KENT, is against apportionment of freight in such a case, upon the principle that the contract of affreightment is an entire contract, and it follows that a delivery of the whole cargo is a condition precedent to the recovery of freight. The rule applicable to the present case is thus stated by Lord Tenterden, in his admirable work on shipping. The apportionment of freight usually happens when the ship, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage. In this case, we have already seen that the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to the whole freight; but if he is unable, or if he declines to do this, the general rule of the ancient maritime law is, that freight shall be paid according to the proportion of the voyage performed. The rule as laid down in the law of Oleron, is to the following effect: "If a ship depart with a cargo from Bordeaux, or other place, and it happens that the ship is disabled, and as much of the cargo is saved as possible, the merchants and master enter into a great debate, and the merchants demand to have the goods of the master; they may have them, upon paying freight for so much of the voyage as the ship has advanced, ratably in proportion if the master pleases; but if the master will, he may repair his ship, if he can do it speedily, and, if not, he may hire another ship to complete the voyage, and shall have his freight of the

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Rositer v. Chester.

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goods, to be reckoned according to their proportion to the whole cargo." Such is the simple and precise language used in this ancient code in respect to the principle we are considering. The same equitable rule is adopted by other authors on maritime law, and in the French ordinance on this subject.

The opinion of Lord MANSFIELD, in the case of *Luke et al. v. Lyde*, 2 Burr., 888, seems to have had a controlling influence upon subsequent cases involving the same questions; and in the note in *Ab. on Sh.*, 329, by Mr. Justice STORY, it is said, that "that case seems at first to have been understood to justify the claim of a *pro rata* freight, whether there was a voluntary or compulsive acceptance of the goods at an intermediate port by the owner." It will be found upon critical examination of that case, that the following rule was established: That if a freighted ship becomes accidentally disabled on her voyage without the fault of the master, the master has his option either to refit, or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage. If the ship is so disabled that the master cannot carry the goods in her, or he cannot find a ship to carry them to the port of delivery, he shall still be paid his freight, in proportion, however, only to what he has performed of the voyage; but the merchant may abandon all the goods, and then he is excused freight.

In the case of *Scott v. Libby and others*, 2 Johns., 836, Mr. Justice THOMPSON remarked as follows: "Nor is this a case for *pro rata* freight. Here was no acceptance of the cargo at an intermediate port. A variety of cases may occur where the owner of goods may make himself responsible for freight by an *acceptance* of his goods short of the port of destination. But this results from an

*Rosster v. Chester.*

*implied contract, raised by the acceptance of the cargo; and a supposed benefit received by the owner, from a partial transportation of the goods.*" It is to be noticed here, that much stress is laid upon the fact that there *was no acceptance of the cargo* at an intermediate port, and therefore no contract to pay freight could be implied.

In the case of *Williams v. Smyth*, 2 *Caine*, 13, the same judge says: "We take it to be a well settled rule, that where a ship by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage, and the goods are there received by the owner, freight must be paid according to the proportion of the voyage performed."

The rule thus laid down was fully recognized in the case of *Robinson v. Marine Ins. Co.*, 2 *Johns.*, 328, where Kent, Chief Justice, uses this strong language: "It is now too late to deny or disregard the rule, that freight *pro rata itineris* is due when a ship, by reason of perils, goes into a port short of her destination, and is unable to prosecute the voyage, and the goods are there received by the owner. An implied *assumpsit* to pay for the labor and service rendered, is raised by the acceptance of the goods at the intermediate port." And the chief justice refers to *Luke v. Lyde* in support of the rule thus laid down.

In the case of *Marine Ins. Co. v. United Ins. Co.*, 9 *Johns.*, 186, the court held, that "there must be a voluntary and unconditional acceptance of the goods, by the owner, at an intermediate port, to form the basis of a new contract to pay ratable freight." The same doctrine is recognized in *Welch v. Hicks*, 6 *Cow.*, 504, in *Center v. American Ins. Co.*, 7 *Cow.*, 564, and in *Hooe v. Mason*, 1 *Wash.*, 207.

The cases of *Callender v. Insurance Co. of North America*, 5 *Binn.*, 525, and *Gray v. Waln*, 2 *Serg. and Rawle*, 229, sustain the rule, that to justify the claim of a *pro rata*

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Rositer v. Chester.

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freight, there must be a voluntary acceptance of the goods at the intermediate port, *either by words or actions*, so as to leave a fair implication that the further carriage of the goods was intentionally dispensed with. And the principle of these cases has been adopted by the federal courts: *Catlett v. Colum. Ins. Co.*, 12 Wheat., 383; *Caze v. Baltimore Ins. Co.*, 7 Cranch, 358.

It only remains to apply these principles which are founded in equity and justice to the facts of this case.

1. Was the boat, by reason of perils, driven into a port short of her destination? It clearly appears that she was. The special verdict finds that Chicago was her port of destination; that she encountered a severe gale and was in danger of perishing from the violence of the wind and the roughness of the waves; that after long struggling with the tempest and being in great danger of perishing, the master and crew agreed that it was necessary to lighten her, etc., and further, that the boat was got back in safety to the port of Detroit.

2. Was she unable to prosecute the voyage? That she was, appears from the finding in a special verdict, that "the close of navigation was at hand, and the vessel being much injured, the voyage was abandoned."

3. Were the goods accepted by the plaintiffs at Detroit, the intermediate port? A little more difficulty arises in giving an answer to this question, for the reason, that in considering whether there was, or was not, a voluntary acceptance by the owner of goods at an intermediate port, the courts do not seem to understand in the same sense, the same principles. In the language of the learned note, from which I have freely quoted, it is said that "a voluntary acceptance may, in some of the cases, have been thought to mean no more than an acceptance of the goods or their proceeds, whether it has resulted from choice in waiving any further transportation of the goods, or from that

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Rossiter v. Chester.

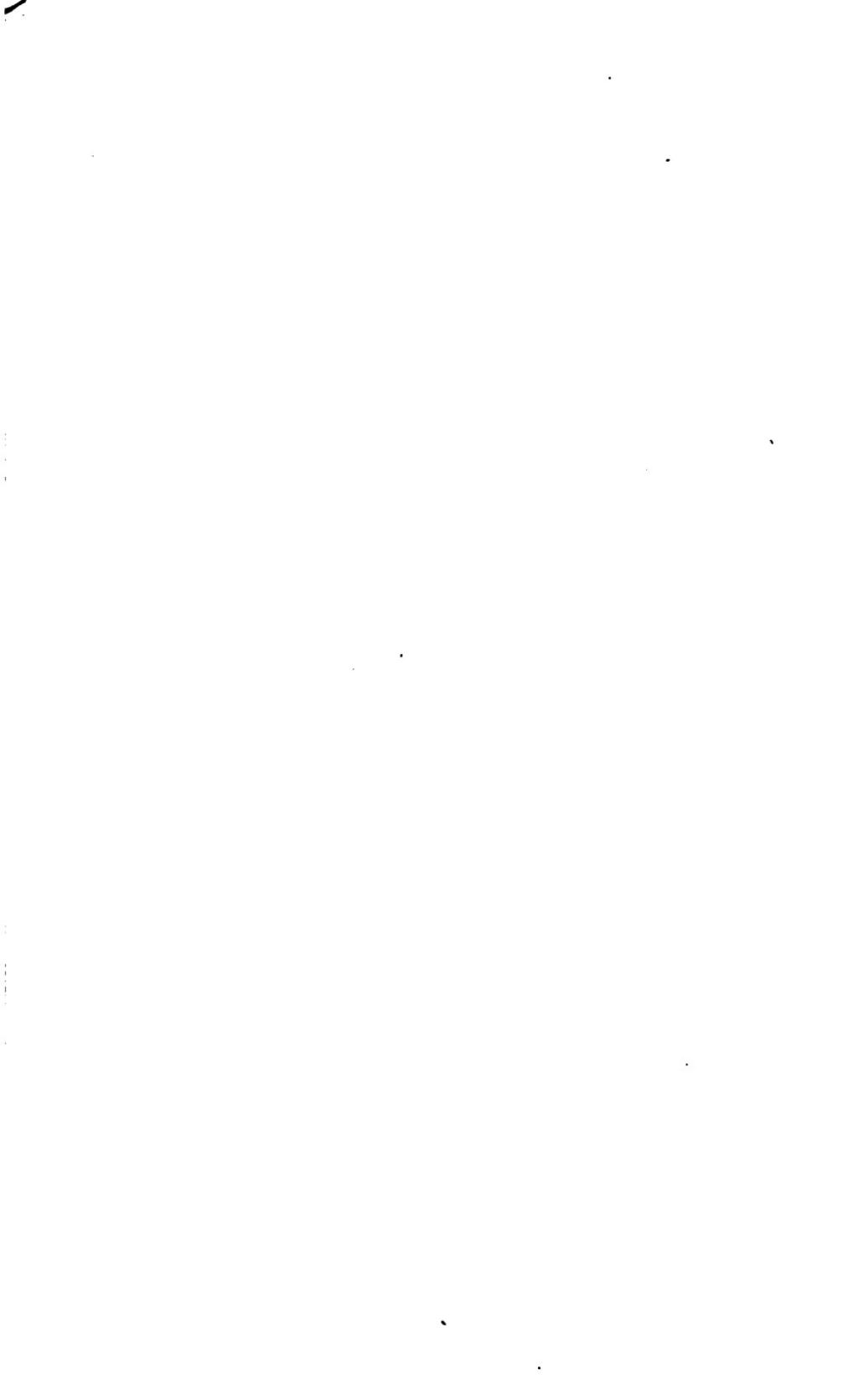
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moral necessity, which the impossibility of pursuing the voyage, or otherwise preserving the goods, might impose upon the owner:" *Abb. Sh.*, 329, *note*. But whatever obscurity may appear in the reasoning of some judges on this point, we think it very clear that but little doubt can exist in the present case. The plaintiffs were fully advised that the voyage, in consequence of the dilapidated condition of the boat, and especially in view of the fact that the season had so far advanced as to render its prosecution extremely hazardous, was abandoned. This circumstance, taken in connection with the further fact that the plaintiff offered to accept the goods upon payment of the charges for storage, and that the present action was brought to recover the possession of the goods, shows very clearly that there was, both by words and actions, such a voluntary acceptance, as to create a fair implication that the further carriage of the goods was intentionally dispensed with. And, as there was no default on the part of the master, or refusal, upon demand made by the owner of the goods, to prosecute the voyage at the earliest moment consistent with prudence, we are of opinion that there existed a lien for the payment of freight *pro rata*.

FELCH, J., did not participate in the decision, the cause having been argued before he took his seat upon the bench.

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END OF JANUARY TERM.



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
STATE OF MICHIGAN,

IN JULY TERM, 1848.

*P R E S E N T:*

HON. GEORGE MORELL . . . . . CHIEF JUSTICE.  
HON. EPAPHRODITUS RANSOM,  
HON. CHARLES W. WHIPPLE,  
HON. ALPHEUS FELCH, } JUSTICES.

**Byrne v. Beeson.**

A tenant cannot dispute the title of his landlord, nor, by his own act merely, change the tenure, so as to enable himself to hold against his landlord. He cannot, during the continuance of the lease or tenancy, make a valid attorneyment to a third person without his landlord's consent. (a)

A complained against B, under the statute of forcible entry and detainer, for holding over possession of certain premises, leased by B from A, contrary to the terms and conditions of the lease. Proof was offered in defense, that B was, at the time of the alleged leasing from A, in possession of the premises under a valid and subsisting lease from C. Held, that it was competent for either B, the defendant, or C, his landlord, to defend by showing these facts; and this, even though A claimed title to the premises under an act of the legislature granting the same to him.

A contract by which a tenant is induced to desert his landlord, is corrupt and void; and the person to whom the tenant has attorned, cannot maintain an action upon it. (b)

In error on *certiorari* from two justices of the peace for the county of Berrien.

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(a) This principle is reaffirmed and applied in *Falkner v. Beers*, 2 Doug., 117; *Lee v. Payne*, 4 Mich., 106; *Blanchard v. Tyler*, 12 Mich., 839; *Ryerson v. Eldred*, 18 Mich., 12; *Fuller v. Sweet*, 30 Mich., 237; *Bertram v. Cook*, 32 Mich., 518.

(b) See *Fuller v. Sweet*, 30 Mich., 237.

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*Byrne v. Beeson.*

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This was a proceeding under the statute "Of forcible entry and detainer" (*R. S.*, 490), and the act amendatory thereto (*S. L.* 1840, p. 83). Beeson filed, before said justices, a complaint against Byrne for holding over possession, as his tenant, of a certain quarter section of land leased to him, contrary to the terms and conditions of the demise. Byrne was duly summoned, and appeared to answer to the complaint. The counsel who appeared for him, claimed also to appear for one Adderly, and to assert his rights in relation to the premises. On the trial of the complaint, before the justices and a jury impaneled pursuant to the statute, the complainant proved that, on the 10th day of March, 1842, his agent, pursuant to his instructions, called upon Byrne who then was, and who, it was admitted, previously had been, in possession of the premises in question, and asked him if he knew that Beeson had purchased the land. Byrne replied that he did. After informing Byrne that Beeson had the land by act of the legislature, the agent told him that he could remain on the land at ten cents per month, and Beeson would give him employment six months in the year, and ten days notice when he wished him to quit. Byrne agreed to comply with these terms. In this conversation something was said about the claim of one Adderly, and the witness thought Byrne stated that he was there, or came there, under Adderly. Due notice to quit the premises was proved to have been given by the complainant.

Proof was offered in defense, that one Adderly was in possession of the land prior to the said 10th day of March, 1842; that, on the 15th day of February, 1842, Adderly leased the premises to him by a written lease; and that he was in possession under this lease, as the tenant of Adderly, at the time of the alleged leasing to him by Beeson. The court refused to permit these facts to be given in evidence. The court found for the complainant, and

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Byrne v. Beeson.

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the cause is brought before this court by *certiorari* on an allegation of error in the decision of the court below, rejecting the evidence offered on the part of the defense.

*Vincent L. Bradford*, for the plaintiff in error.

*J. S. Chipman & C. Dana*, for the defendant in error.

FELCH, J., delivered the opinion of the court. The principle is well settled that a tenant admits the title of the landlord under whom he holds, and cannot attorn to a third person, without the landlord's consent: *Jackson v. Brush*, 20 Johns., 5. And when the relation of landlord and tenant once attaches, it binds all who may succeed to the possession, through or under the tenant, whether immediately or remotely: *Jackson v. Harsen*, 7 Cow., 823; *Jackson v. Davis*, 5 Cow., 123.

Byrne's attornment to Beeson could, therefore, have been of no avail, if, at the time it was made, he was the tenant of Adderly, holding possession of the premises under a valid and subsisting lease from him. Byrne had no right, in such case, to put Beeson into possession; nor could he, by merely promising to pay rent to Beeson, and still continuing in possession, change the rights of Adderly. The possession was still Adderly's, held through his tenant. This doctrine is fully asserted by the Supreme Court of the United States in *Willeson v. Watkins*, 3 Pet., 43. The court, speaking of the power of the tenant, say: "He cannot change the character of the tenure, by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination by the lapse of time, or the demand of possession." Even if Byrne, while the tenant of Adderly, had given to Beeson actual possession of the premises,

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*Byrne v. Beeson.*

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such possession would have been deemed in law a continuation of the tenancy under Adderly, and subject to his rights as landlord.

The complainant founded his right to recover possession of the premises upon Byrne's agreement to hold under him and pay ten cents per month for rent. If, at the time, Byrne had no power to enter into such an agreement, then the complainant could have acquired no rights by, or under it. The evidence offered in defense, tended to show that Byrne had no such power. For, if, at the time when that agreement was made, he was in possession under a valid lease as the tenant of Adderly, we have seen that, by the well established principles of law, he was prohibited from attorneying to, or making himself the tenant of any one else, to the injury of his landlord.

But it is contended that the court below properly rejected the evidence offered on the part of the defense, because: 1. Byrne admitted Beeson's title by attorneying to him, and was estopped from afterwards denying it, or setting up an adverse claim in Adderly as his prior landlord. 2. Adderly had no right to come in and show these facts in defense, because he was not a party in the cause.

I am by no means ready to assent to the position that a tenant himself cannot, in any instance, urge in defense of an action of this kind, the insufficiency of his own attorneyment. When it is admitted that he is the tenant of the plaintiff, he is estopped from denying the plaintiff's right. But he may deny the existence of such tenancy. He may deny the making, or the validity, of the contract by which such tenancy is alleged to have been created. He may deny his sanity at the time it was made. He may allege that it is vitiated by fraud on the part of the lessor. He may allege it to have been a corrupt agreement between himself and his pretended lessor, fraudulently to put the latter into possession of the premises, to the injury of his

Byrne v. Beeson.

true landlord; and call upon the court to refuse their aid in carrying it into effect. I can see no reason why he should not be permitted to avail himself of such defense. By his new attornment he has not freed himself from his duties and liabilities to his true landlord; and such a defense would be but an act of justice to his landlord, and would inure to his benefit. In *Willeson v. Watkins*, before cited, the court say, that "by setting up, or attorning to, a title adverse to his landlord, the tenant commits a fraud as much as by the breach of any other trust." If it be fraud on the part of the tenant, surely, it can be no less so on the part of him who should make use of such means to dispossess the landlord, instead of commencing his suit at law, and trying his legal right to the possession. It is not in an action of this kind that the title is to be tried; and it is the duty of the tenant, or of any one holding under him, first to restore possession to the landlord (*Doe ex dem. Knight v. Lady Smyth*, 4 *Maule and Selw.*, 347); and then, the law is open to him to try any right he may have in the premises, by a suit brought directly for that purpose. The law will sanction no fraud to evade these salutary principles. In *Morgan v. Ballard*, 1 *Mass.*, 558, it was decided that a contract by which a tenant was induced to desert his landlord, was corrupt and void; and that the person to whom he had attorned, could not maintain an action upon it. The object for which the rejected testimony in this case was sought to be introduced, is not stated. If it was designed, in connection with proof that Beeson knew at the time of the attornment that Byrne held under Adderly, to show a corrupt agreement, having for its object the unlawful dispossession of the landlord, we think it should have been admitted. Its sufficiency would have been a matter for the consideration of the jury. It would have gone to the validity of the contract between the parties, on which all the complainant's right to the

*Byrne v. Beeson.*

possession of the premises was founded. If the relation of landlord and tenant did not exist between them, or if the contract out of which it was claimed to have arisen, was of such a character that the court would not have assisted the parties in enforcing it, then the complainant would not have been entitled to recover.

But without reference to this question, we are satisfied that Adderly had the legal right to appear and to set up this defense. If it were not so, the corruption, and sometimes the ignorance of a tenant, might jeopard, or even destroy the best interests of the landlord. In actions of ejectment, the real party in interest was always allowed to become a party to the suit; and we can see no reason why in this action he should not also be heard. If the tenant was to refuse to employ counsel, or to defend the cause, the landlord's rights being necessarily in jeopardy, he ought to be permitted to assume the defense. This question arose in *The People ex rel. Quackenboss v. Burtch*, 2 Johns. Cas., 400, which was a proceeding under the act against forcible entry and detainer of the state of New York, and the court there said: "Those who stand behind the tenant may here, as in ejectment, at common law, and independent of the statute, defend the right." In that case, as in the one before us, the person seeking to defend, claimed the premises as landlord of the defendant, while the latter had disclaimed his title and attorned to another; and the court said that these were facts, which might be tried in the action, and ought to arrest any collusive proceedings between the prosecutor and the defendant.

The fact that Beeson acquired or claimed title to the land, through an act of the legislature of this state, does not change the rights of the parties, so far as the questions here presented for our decision are concerned. If Adderly was in possession of the land, occupying through his tenant, and claiming title, an act of the legislature

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**Bowne v. Johnson.**

giving it to Beeson, would give no such paramount title to him, as to shut out Adderly's defense. It could, at most, merely authorize Beeson to proceed at law to obtain possession of the premises mentioned in his grant, while the other party would have the same opportunity for defense, as in case of a title claimed through any other source. The state, through its legislature, may grant lands; but, its grant, like that of any other grantor, conveys only the title which the state actually possessed in the premises. If the tenant held by prior title from the same source, or by better title from another, or by mere possession when the state had no right or interest, it would supersede a grant thus obtained. So far as the trial of the title is concerned, we see nothing in the nature and source of his title, to take the complainant's case out of the general rule of law.

We are of opinion that the justices erred in rejecting the testimony offered in defense. The judgment below must, therefore, be reversed.

*Judgment reversed.*

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**Bowne v. Johnson.**

A plaintiff, against whom judgment of nonsuit has been rendered in a justice's court, on his failure to appear and prosecute his suit on the day of trial, cannot appeal the case to the Circuit Court; such judgment not being a *final* judgment within the meaning of the statute. S. L. 1841, p 107, § 94. (a)

Case certified from Kalamazoo Circuit Court.

The plaintiff brought this suit originally before a justice of the peace, and failing to appear on the day of trial, judgment of nonsuit and for costs was rendered against

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(a) Otherwise if the nonsuit is involuntary: *Patridge v. Lott*, 15 Mich., 251. Whether an appeal would not lie from any judgment of nonsuit under our present statute, *quere?* See C. L. 1871, § 5431.

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*Bowne v. Johnson.*

him; whereupon, he afterwards appealed the case to the Kalamazoo Circuit Court. The defendant moved the latter court to quash the appeal, on the ground that the case was not within the statute authorizing an appeal to be taken. The presiding judge reserved the question arising upon the motion for the opinion of this court thereon.

*Charles E. Stuart*, for the plaintiff.

*E. Belcher*, for the defendant.

**FELCH**, J., delivered the opinion of the court.

The right of appeal in this case is not claimed under any other clause of the statute (*S. L.* 1841, p. 107, § 94), except that providing for appeals from *any final judgment* of a justice of the peace.

Was the judgment in the case a *final judgment* within the meaning of the statute?

A judgment of nonsuit is a final disposition of the suit in which it is entered, but it does not ordinarily bar a subsequent suit for the same cause of action; it is not a final disposition of the subject matter in litigation. In examining the books, it will be found that the term *final judgment* is sometimes used to signify a final disposition of the particular suit, and sometimes a final determination of all litigation on the subject matter thereof.

The judgment in this case, however, was simply on the failure of the plaintiff to appear and prosecute his suit. The legal effect of such failure on his part, was an abandonment of his suit, which operated as a discontinuance of the action by the voluntary act of the party. The justice was authorized to enter the discontinuance of the suit, and thereupon to render judgment against him for costs; and whether the entry of nonsuit be technically correct or not, the court will look at the nature of the proceedings, and give to the transaction its legal effect. *The People v.*

*Bowne v. Johnson.*

*Schoharie Common Pleas*, 2 Wend., 260; *Relyea v. Ransay*, Ib., 602; *The People v. Whaley*, 6 Cow., 661; *Sprague et al. v. Shed*, 9 Johns., 140; *Hubbard v. Spencer*, 15 Johns., 244.

We cannot think that a judgment thus entered on the voluntary abandonment of his suit by a plaintiff before a justice, is such a final judgment as is contemplated by the statute. The remedy by appeal is given to the party "conceiving himself injured, or aggrieved, by such judgment." But how can he be injured or aggrieved who voluntarily discontinues his suit, and, of his own accord, subjects himself to the legal consequence—a judgment against him for costs?

A question under similar law was decided in the Supreme Court of the United States, in *Evans v. Phillips*, 4 Wheat., 78. The judiciary act of 1789, provides for a review, on error, of "final judgments and decrees," in the Circuit Courts. The Supreme Court dismissed the writ of error, on the ground that the plaintiff had submitted to a nonsuit in the court below, in which case no writ of error would lie.

It is the opinion of the court, that the motion to quash the appeal, should be granted by the Circuit Court.

*Certified accordingly.*

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Rood v. Jones.

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**Heman Rood v. Nathan Jones.**

An agreement by the plaintiff with the defendant, to forbear suit against a third person, who was the plaintiff's debtor, is a good consideration for the defendant's promise to pay the debt. (a)

A creditor's agreement to forbear seizing certain property on attachment against his debtor, will not support a promise, by a third person, to pay the debt, if, at the time the debtor had no interest in the property.

In a suit upon a promissory note, made by the defendant, in consideration of the plaintiff's forbearance to seize certain property on attachment against his debtor, the *onus* of proving that the debtor had, at the time, no interest in the property, and that therefore the note was without consideration, is upon the defendant. (b)

**Error to Cass Circuit Court.**

The plaintiff brought *assumpsit* upon two promissory notes, made by one Martha Lindsey and by the defendant, as surety, payable six months after date, to the order of the plaintiff. Plea, general issue. On the trial it appeared on the part of the defense, that William Lindsey, the husband of Martha, being indebted to the plaintiff, had absconded or left the state, and that, on the day of the making of the notes, the plaintiff's agent went to the residence of said Martha and her family, and told her that he wished her to secure a debt which the plaintiff had against her husband, by the joint note of herself and brother, the defendant, and that, unless she did so, he should attach the property on the premises occupied by her. Whereupon, the notes declared upon, were executed and delivered to the plaintiff's agent.

The court charged the jury that an agreement to forbear suit was not a good consideration for a promissory note or other promise, unless made with the debtor, or some person on his behalf, as, if made with a stranger, the debtor could not enforce it, or recover damages for the

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(a, b) See Sanford v. Huxford, 32 Mich., 313, 315, 318.

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*Rood v. Jones.*

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breach of it, and therefore the creditor could not enforce it against such stranger.

The court further charged the jury that an agreement by a creditor, not to attach the property of his debtor, would not preclude him from proceeding against such debtor immediately, by ordinary process of law, and that, therefore, such agreement would not be a good consideration for a promise, unless it was made to appear that the debtor had property subject to attachment at the time; but that, unless it was so made to appear, such promise would be without consideration and void.

The plaintiff excepted to the charge of the court, upon these two points, and, the jury having found a verdict for the defendant, tendered a bill of exceptions, and removed the record into this court by writ of error.

*Vincent L. Bradford*, for the plaintiff.

*E. S. Smith*, for the defendant.

**FELCH**, J., delivered the opinion of the court.

1. The substance of the ruling of the court on the first point, to which exception is taken, may be stated in these words. If A has a demand against B, and threatens to bring his suit, and C, a stranger, in consideration that he will forbear to do so, gives to A his promissory note for the amount of the debt, such consideration for the promise is insufficient, and the note invalid. This proposition appears to concede that such consideration would be sufficient to maintain a promise to pay by the debtor himself, but denies that a stranger could be bound by the promise.

It is not denied that every promise must be founded on some legal consideration. The rule of law in reference to the sufficiency of the consideration, seems to be that it must arise, either, first, by reason of a benefit to the party promising, or, at his request, to a third person, by the act

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*Rood v. Jones.*

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of the promisee; or, secondly, on occasion of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation, at the instance of the person making the promise, although such person obtain no advantage therefrom: *Ch. Contr.*, 29. If, in the given case, the consideration be within either of these branches of the rule, it is sufficient.

When a promise to pay the debt is made by a third person to the creditor, in consideration of his forbearance to sue his debtor, it comes under the latter branch of the rule. The forbearing to sue is a damage to the creditor. He is about to enforce the collection of his dues by using the legal means for that purpose, but he lays aside the instruments by which his money might be obtained of the debtor, in due process of law, and receives instead, the promise of a third person to pay the debt. It can make no difference whether the forbearance be for a long or a short time, or whether the creditor suffers much or little from his forbearance; it is enough if there is an actual relinquishment of his legal remedy, by giving time, or forbearing to enforce the collection of his demand. By forbearing to sue, the plaintiff suffers damage: *Elting v. Vanderlyn*, 4 Johns., 287; *Lent et al. v. Padelford*, 10 Mass., 230; *Lonsdale v. Brown*, 4 Wash. C. C. R., 148; *King v. Upton*, 4 Greenl., 552.

In all of the above cases, with the exception of that of *Lonsdale v. Brown*, the promise was made by a third person, and no objection appears to have been taken on that ground. The right of recovery against a third person on such a promise, is, however, sustained also by direct authority. In *Chitty on Contracts*, 35, such agreement to forbear, is stated to be a "sufficient consideration for the promise of the debtor, or a third person, to pay the debt, or more, or to do any other act;" and in support of this doctrine, 1 *Roll. Ab.*, 24 pl., 33; *Com. Dig.* *Action upon the case upon assumpsit*

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Rood v. Jones.

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(F.) 8. *Assumpsit* (B.) 1; 2 *Saund.*, 136; and 3 *Chit. Com. L.*, 66, 67, are cited. In a note to *Barber v. Fox*, 2 *Saund.*, 136, it is laid down that a promise, by an executor, to pay the debt of the testator, in consideration of forbearance to sue, will bind the executor *de bonis propriis*, whether he has assets or not. In *Smith v. Algar*, 1 *Barn. & Adolp.*, 603, decided in the King's Bench, in 1830, the defendant, in consideration of forbearance to levy a *fi. fa.* on the property of a third person, the judgment debtor promised to pay nearly double the amount of the debt. The court, upon demurrer, held the defendant's promise good, and the consideration sufficient. They decide nothing as to the measure of damages, but declare the promise, though made by a third person, to be binding. Indeed, on an examination of the numerous cases in the books where suits have been maintained upon promises founded on consideration of forbearance, most of them will be found to be cases where the promise was made by third persons. In ordinary cases, no such consideration would be needed to sustain a promise by the debtor; the original indebtedness being sufficient for that purpose.

It is not necessary for us to inquire whether the transaction was of such a character that the debtor could avail himself of it to defer the collection of the debt against him, nor whether the defendant could maintain a suit for the breach of the plaintiff's contract to forbear to sue. If the plaintiff has forborne to sue, in fact, according to his undertaking, it is a sufficient consideration to enable him to recover of the defendant on his promissory notes, given for the amount of the debt: *Chit. Contr.*, 37.

From this view of the law of the case, it is evident that such a promise may be good, although not made with the debtor, or any person in his behalf, and that the consideration of forbearance by the plaintiff, is sufficient to maintain a suit upon a promissory note given by a third person

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Rood v. Jones.

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for the amount of the debt. The charge of the court below, on this point, was therefore erroneous.

2. The second branch of the charge of the court, to which exception was taken, was, in substance, that in order to make a promise of the defendant to pay the debt of another, valid, when founded upon consideration of the creditor's forbearing to issue an attachment against the debtor's property, it should appear that the debtor had property subject to attachment at the time. The proof in the case went to show that the plaintiff threatened to take out an attachment, and levy on certain property on the place where Mrs. Lindsey resided, as the property of the debtor. The consideration of defendant's promise, as before stated, was his forbearing to obtain this attachment and take the property thereon, as he legally might have done. It is the damage he has sustained, or may sustain, by thus yielding his power over the debtor's property, that constitutes the validity of the consideration. Certain things, however, are necessary to the sufficiency of such a consideration. There must be, for instance, a valid debt due to the creditor. If no suit could be maintained, and this were clearly shown on the trial, the consideration for the defendant's promise would be insufficient: *Chit. on Contr.*, 35; *Gould v. Armstrong*, 2 *Hall.*, 266. So, when the consideration was a forbearance to levy by virtue of a *f. fa.* on certain property, and it proved that he had no right to levy, because the property was not the debtor's, the consideration would fail. So, in case of a forbearance to take an attachment against certain specified articles of personal property, if it appeared on the trial that the debtor had no interest in the property liable to attachment, the consideration would fail. The detriment or injury to the plaintiff in not obtaining his attachment, would, in such case, be nothing. His forbearance would be no waiver or delay of any legal right, and being utterly worthless in fact and

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Hasey v. White Pigeon Beet Sugar Company.

in law, could not be the foundation of a valid promise. So far, then, as the charge of the court was intended to assert the doctrine that the consideration was insufficient, if the debtor had no interest in the property intended to be attached, it was correct. It should, however, be remembered, that the promissory notes on which the plaintiff declared, of themselves, imported a consideration, and the burden of proof was on the defendant to show the failure of the consideration, or its original insufficiency.

*Judgment reversed.*

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#### Hasey v. The White Pigeon Beet Sugar Company.

An instrument signed officially by the president and secretary of a corporation, requesting its treasurer to pay to K. or bearer, a certain sum of money, is a bill of exchange drawn by the corporation upon itself.

No formal acceptance of such a bill is necessary, the act of drawing being deemed an acceptance of it.

Such a bill is the same, in legal effect, as a promissory note; it imports a promise to pay on demand, and an action may be maintained upon it without proof of a demand of payment from the treasurer of the corporation.

Error to St. Joseph Circuit Court. *Assumpsit*, brought \*by the plaintiff in error, upon the following instrument:

"By order of the board of trustees, the treasurer of the White Pigeon Beet Sugar Company will pay to Henry A. Knapp, or bearer, thirteen dollars.

"C. Yates, Sec'y.                           Sam'l. A. Chapin, Pres't.

"White Pigeon, June 10, 1840."

The defendants objected to its being read in evidence without proof of its presentment and demand of payment,

*Hasey v. White Pigeon Beet Sugar Company.*

at the treasury of the corporation, before suit brought. The court sustained the objection, and refused to permit the instrument to be read in evidence.

Whereupon, the plaintiff submitted to a nonsuit, and tendered a bill of exceptions, which was signed, and the record removed to this court by writ of error.

*J. E. Johnson*, for plaintiff.

*L. F. Stevens*, for defendants.

[195] \*FELCH, J., delivered the opinion of the court.

[197] \*The instrument offered in evidence in this case, was in form a bill of exchange. It was drawn by the corporation, under the signature of its president and secretary, by order of the board of trustees, who, by the act under which the corporation was organized, were the managers of the concerns of the corporation, and had control over its funds in the hands of its treasurer. It was drawn upon the treasurer of the corporation, who was but the officer, the agent, of the corporation, and whose acceptance must have been considered the acceptance of the corporation. It was then, a bill drawn by the corporation, through its proper officers upon [198] \*the same corporation, represented by another officer; in other words, a bill drawn by the corporation on itself.

Although the drawer and drawee are usually two distinct persons, yet it is not necessary that they should be so. A man may draw a valid bill on himself, and in such case no formal acceptance of it is necessary, the very act of drawing such a bill being deemed an acceptance of it: *Cunningham v. Wardwell & Fairf.*, 466; *Chit. on Bills*, 28. It has been held, also, that such a bill is, in legal effect, a promissory note: *Roach v. Ostler*, 1 *Man. & Ry.*, 120.

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*Hasey v. White Pigeon Beet Sugar Company.*

Being, then, a bill both drawn and accepted by the corporation, no demand of payment or notice of non-payment was necessary to the plaintiff's right of action upon it, unless made so by the terms of the instrument itself. The bill is not made payable at any particular time or place. It is simply a request to pay generally, and the legal effect of the transaction is an acceptance by the defendants, to pay in the same terms. This must be understood to be a promise to pay the amount presently; an acknowledgment of an immediate and unconditional indebtedness, for which the plaintiff had a right to bring his suit at once. As between these parties, therefore, no demand was necessary (*Chit. on Bills*, 392), and the court erred in refusing to permit the bill to be read in evidence, without proof of such demand.

The judgment of the court below must, therefore, be reversed.

*Judgment reversed.*

Beach v. Botaford.**Beach v. Botaford.**

A judgment by confession is void for want of conformity to the statute (R. S., 339, § 2), where it does not appear to be "signed by the person making the same, in the presence of the justices and one or more competent witnesses." The statute must be construed to require the witnesses to subscribe their names as such. (a)

A justice of the peace entered across a judgment on his docket, that it was paid, stating the day, and signed the entry in his official capacity. Held, that such entry was *prima facie* evidence that the judgment was satisfied, and that this evidence was not rebutted by proof, unaccompanied by any explanatory testimony, of another entry immediately below the former, on the same docket, without date, and signed by the justice in his individual capacity, stating, in effect, that the judgment had not been paid, according to the import of the former entry.

Where a defendant, in an action of replevin, rests his claim to the property upon a seizure as constable, by virtue of an execution, he must, before proving the execution, show a valid judgment upon which it issued; and he will fail to establish any right to the property by virtue of the levy, if it appears that the judgment was void, or had been paid, before the issuing of the execution. (b)

The rule that a ministerial officer is protected in the execution of process, issued by a court or officer having jurisdiction of the subject matter, and of the process, if it be regular on its face, and does not disclose a want of jurisdiction, does not apply in such a case. It is a rule which merely *protects* the officer when proceeded against as a wrong-doer; it confers upon him no right to property; and, in replevin, the right to property, and not whether the defendant is a trespasser, is in issue. (c)

**Error to Oakland Circuit.** This was an action of replevin, tried at the September term, 1842, of the Circuit Court, before the Hon. CHAS. W. WHIPPLE, presiding judge. The defendant in error was the plaintiff in the court below. The declaration was for the unlawful taking and detention of one span of horses, the property of the plaintiff.

On the trial, the defendant below admitted the taking and detention of the horses, and that they were the property of the plaintiff. The plaintiff then rested his case.

The defendant below then read in evidence, in defense

(a) To the same effect, Spear v. Carter, 1 Mich., 19; Wilson v. Davis, *Ibid.*, 156; Austin v. Grant, *Ibid.*, 490. See also, 15 Mich., 82; Cox v. Crippen, 13 Mich., 502; Shadbolt v. Bronson, 1 Mich., 85. Signature of witnesses has long been unnecessary: R. S. 1846, p. 387, § 8; C. L. 1857, § 3855; C. L. 1871, § 5251.

(b, c) Affirmed, Le Roy v. E. Saginaw City R. Co., 18 Mich., 334; Adams v. Hubbard, 30 Mich., 104. See Gidday v. Witherspoon, 35 Mich., 368.

Breach v. Rottnest L.

an execution issued by Amos Mead, a justice of the peace, dated March 3, 1841, purporting to be upon a judgment rendered before John Hovey, also a justice of the peace, November 26, 1840, against the plaintiff below, at the suit of William McDermott, for \$90 damages and 58 cents costs, for the payment of which judgment, in three months from its date, one James B. Lee was security; having first proved Mead's signature to the execution, and that he was, on the day of its date, an acting justice of the peace of the town of Farmington, Oakland county; and also, that Hovey was an acting justice of the peace of the same town, on the day of the date of the judgment. He further proved that at the time of the taking alleged in the declaration, he was a constable of said town of Farmington, and took the horses by virtue of the execution. After proving the value of the horses, he rested his case.

No objection appears to have been made by the plaintiff to the reading of the execution in evidence without proof of the judgment on which it was issued; but, the evidence on the part of the defense being closed, the plaintiff introduced and read to the jury the docket of John Hovey, Esq., as follows:

"William McDermott, } Nov. 26, 1840.  
vs.

"Lemuel Botsford. I hereby confess judgment in favor of plaintiff, for the sum of ninety dollars, due on money lent, to be staid three months and no longer, and costs of suit. Lemuel Botsford.

"Judgment rendered in accordance with the above confession, Nov. 26, 1840. Damages, \$90. Justice's fee, 58 cents. Judgment, \$90.58.

"I hereby become security for stay of execution on the above judgment, and agree to pay the said damages and costs, and interest on the same, in three months from the rendition thereof. *James B. Lee.*"

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*Beach v. Botsford.*

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Written across said judgment on the docket were the following entries:

"The within judgment for damages and costs, paid this sixth day of February, 1841. *John Hovey, J. P.*

"I hereby consider the above receipt null and void, for that the said money never came into my hands only for counting, and that according to the best of my recollection, it was taken away without my authority, by defendant's agent, Myron Botsford, and that there was a conspiracy, in the whole transaction, to defraud.

*"John Hovey.*

"Transferred to Amos Mead, a justice of the peace, for collection, March 3, 1841. *John Hovey."*

The plaintiff proved that Hovey was a justice of the peace on the 6th day of February, 1841. The evidence in the case was then closed.

No evidence was introduced tending to show that the defendant had any knowledge of any payment to John Hovey.

The defendant asked the court to charge the jury that he was entitled to a verdict, inasmuch as it appeared from the evidence in the case, that he took the property mentioned in the declaration, by virtue of a legal process, regular on its face, and apparently within the jurisdiction of the justice who issued the same.

The court refused so to charge, to which the defendant excepted.

The court did charge the jury:

1. That if they should find that the judgment had been satisfied, as indicated in the entry of said justice that it was paid on the 6th day of February, 1841, then they must find for the plaintiff, notwithstanding the subsequent entry made by the justice, to explain which no evidence was offered.

2. If the jury should find that the entry of the judg-

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Beach v. Botsford.

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ment was not made pursuant to the statute, that then the process was void, and the plaintiff was entitled to recover. To all which the defendant excepted.

*Geo. W. Wisner*, for the plaintiff in error.

*A. H. Hanscom*, for the defendant in error.

**MORELL, C. J.**, delivered the opinion of the court.

The defendant below, having proved that he took the property by virtue of a legal execution, insists that it is a sufficient justification for the officer, without producing and proving the judgment on which the execution issued. No objection appears to have been made by the plaintiff below, on the trial, to the proof of the execution, without proof of the judgment. He subsequently, however, proved the judgment himself; and he contends:

1. That the judgment was void, not having been entered in pursuance of the provisions of the statute: *R. S.*, 389, § 2.

2. That it appears from the docket of the judgment, that it had been paid previous to the issuing of the execution.

1. The statute (*R. S.*, 389, § 2) authorizes a justice of the peace to enter judgment by confession, "Provided such confession shall be in writing, and signed by the person making the same, *in presence of the justice and one or more competent witnesses.*" The justice derives his authority to enter the judgment solely from the statute, and the confession of judgment should show that the statute was complied with. It does not appear from the entry of the judgment, that the confession was written and signed in the presence of the justice, *and one or more competent witnesses.* Although the statute does not say that the justice and the witnesses shall subscribe their names as witnesses, still, no person can be a witness to the execution of a written instrument, without subscribing it as such; and

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*Beach v. Botaford.*

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it was clearly the intention of the legislature that the witnesses should so subscribe. The statute not having been complied with, the judgment was a nullity: *Tenny v. Tyler*, 8 Wend., 569. The consent of the party cannot make a void judgment valid: *Id.* The justice, therefore, had no jurisdiction over the person of the defendant.

2. Admitting the judgment to have been valid, if it had been paid, the justice had no power to issue the execution upon it. On the 6th day of February, 1841, the justice, in his official capacity, made an entry on his docket, that the judgment for damages and costs was paid. This was *prima facie* evidence that the judgment had been paid and satisfied, and no execution could subsequently issue on the judgment, without showing that this entry was erroneous. The subsequent entry, made by John Hovey, in his individual capacity, and without date, was not evidence in itself. If the plaintiff below placed any reliance upon it, testimony should have been introduced to explain it. None was offered, and the judge was right in directing the jury to disregard it.

But the plaintiff in error insists, that notwithstanding the judgment may be void, or may have been paid, still, the execution is a perfect justification to the officer, and that it is not necessary for him to produce the judgment upon which the execution was founded; and he relies upon the case of *Sawcool v. Boughton*, 5 Wend., 170.

This case was an arrest of the person; and it was held that "a ministerial officer is protected in the execution of process, whether the same issue from a court of limited or general jurisdiction, although the court have not, in fact, jurisdiction of the case, provided, that on the face of the process it appears that the court have jurisdiction of the subject matter, and nothing appears to apprise the officer, but that the court also has jurisdiction of the person of the party to be affected by the process."

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Beach v. Botaford.

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In *Earl v. Camp and Stone*, 16 Wend., 562, which was trespass for taking from his possession property which the plaintiff had, as a constable, levied upon by virtue of a writ of attachment issued by a justice of the peace, and which process the court held to be void, the court say: "It is insisted that the plaintiff, being a ministerial officer, should be protected by his process, which was fair on its face, though the magistrate wanted jurisdiction; and so, indeed, he should, within the case of *Savacool v. Boughton*, 5 Wend., 170, and various other cases decided by this court: *McQuinty v. Herrick*, 5 Wend., 240, 243; *Wilcox v. Smith*, *id.*, 231; *Reynolds v. Moore*, 9 *id.*, 35, 36, *per Sutherland, J.*; *Alexander v. Hoyt*, 7 *id.*, 89; *Coon v. Congden*, 12 *id.*, 496, 499; *Rogers v. Mulliner*, 6 *id.*, 597. These cases go the utmost length, and the true length, in the protection of ministerial officers." "In general they ought not to look beyond the process, and in no case need they do so. The duty is usually to arrest the person, or to take the goods of another, the latter of which is to be followed by a sale. *Savacool v. Boughton*, was an arrest of the person. *Alexander v. Hoyt*, *Reynolds v. Moore*, and *Coon v. Congden*, are cases of goods seized and sold. Our later cases are full and pointed upon the want of jurisdiction in respect to subject matter; and the principle upon which they go is equally applicable to a want of jurisdiction over the person. Accordingly the collector of a militia fine was protected, though the delinquent was exempt from military duty: *Fox v. Wood*, 1 *Rawle*, 143." "Wherever there is jurisdiction of the process, the law means to make the officer safe in yielding implicit obedience. Even the justice who issued his warrant against a resident freeholder, without previous summons or oath, was, in *Rogers v. Mulliner*, 6 Wend., 599, protected within this principle.

"But the rule is one of *protection* merely; and beyond

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Beach v. Botwood.

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that is not meant to confer any right. The armor which it furnishes, is strictly defensive. It is personal to the officer himself; and cannot be used to confer any right upon the wrong-doers, under color of whose void proceedings he is called upon to act. Suppose he goes on and makes sale of the property levied upon; even the innocent purchaser takes no right. To perfect his title, he must show a valid judgment; a solid foundation for the process. This is emphatically so of the party who instituted the proceedings." "In no case where an officer becomes satisfied that there is a want of jurisdiction, is he bound to act in any way. He has a discretion, if he choose to exercise it; and if he refuses in the first instance, the party cannot make him accountable. In *Albee v. Ward*, 8 Mass., 79, the officer had made an arrest and suffered an escape upon a justice's execution, whereby the plaintiff lost his debt. In an action for the escape, though the execution was fair on its face, and imported jurisdiction, yet the officer was allowed to protect himself by showing that it was issued without authority. Yet the court allowed that it furnished a complete protection against an action of trespass. This is following out the long settled distinction laid down by *Hale, C. J.*, in *Anon.*, 1 *Ventr.*, 259; and which was adjudged in *Squibb v. Hole*, 2 *Mod.*, 29; 1 *Freem.*, 129, *S. C.* The same distinction is laid down *obiter*, by *Parsons, C. J.*, in *Dillingham v. Snow*, 5 *Mass.*, 558, with respect to a collector of taxes."

These cases establish the principle, that a ministerial officer is protected by his process, which is fair on its face, although the magistrate wanted jurisdiction, if he is proceeded against as a *tortfeasor*; but in no other case will it protect him, unless he shows a valid judgment.

This is an action of replevin, and the proceedings are *in rem*. The person found in possession of the property, is not called upon to respond in damages as a trespasser,

*Beach v. Botsford.*

for the value of the property; he is merely summoned to appear and answer the plaintiff for the unjust detention of the property. The issue to be tried is, who had the right of property. The question does not arise whether the defendant was a trespasser or not, as the property which the officer has levied upon, is not held by him for his own benefit, but for that of the party for whom he acts. "It is, for every substantial purpose, his action; and if it be obvious he has no right, it necessarily follows that the officer has none. The latter comes *en autre droit*, and must stand or fall upon the claim of his principal. *Per Spencer, J., in Hotchkiss v. Mc Vicar*, 12 Johns., 403, 408. It is not logical in any sense for him to say, 'I am privileged in an act of force, which I do suddenly, according to the command of my writ. The law will protect me in obeying the process which it has authorized another to create; therefore, I acquire a property; nay, another, a wrong-doer, shall take an interest or property, in virtue of that act:'" 5 Wend., 568. Who is to take the money assessed for the value of the goods, if the right of property should be found in the defendant? Not the party who caused the execution to be issued; for his judgment was void or had been paid; and, if paid, it must remain a God-send to the officer; no person could receive it out of his hands.

In all cases of replevin, I have always considered the rule well settled, that if a party claimed to hold the property by virtue of a levy under an execution, he must, in the first place, show a valid judgment for the foundation of that execution, in order to sustain his right to the property.

In this case, although the defendant did not introduce the judgment, which he was bound to do, before he introduced his execution, still, the plaintiff having done so, it would have supplied that defect in the proof (as there

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*Harlan v. The People.*

were no objections made to the execution), if it had been a valid judgment. But it having been shown that the judgment was void, and if not, that it had been paid, the execution, though regular on its face, was also void, and formed no defense for the officer.

*Judgment affirmed.*

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*Harlan v. The People.*

An indictment, under the statute (R. S., 688, § 19), for knowingly having in possession instruments adapted and designed for making counterfeit coin, to wit: Mexican dollars, with intent to use the same, need not allege that the defendant was not employed in the mint of the United States.

The power vested in congress by the federal constitution (Art. I, § 8), "to provide for the punishment of counterfeiting the current coin of the United States," may be exercised by the several states concurrently with congress.

The jurisdiction of the federal courts, over offenses against the laws of congress providing for the punishment of counterfeiting the current coin of the United States, is not exclusive of the jurisdiction of the state courts, over offenses against state laws, making it punishable to counterfeit such coin.

An indictment for violating the laws of this state against counterfeiting (R. S., 688, §§ 16, 18), properly charges the offense to have been committed against the sovereignty of the people of this state, instead of charging it to have been committed against the sovereignty of the people of the United States.

**Error to Berrien Circuit Court.**

This was an indictment against Harlan for violating the provisions of sections 16 and 18 of ch. 5, tit. 1. pt. 4th, of the Revised Statutes of this state. The first count, which was framed under § 18 of the statute, charged the defendant with knowingly having in his possession a press and other instruments, adapted and designed for making

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*Harian v. The People.*

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counterfeit coin, to wit: Mexican dollars, with intent to use the same. The second count, framed under § 16, charged him with uttering and passing certain counterfeit coin, to wit: Mexican dollars, knowing it to be counterfeit. At the trial, before E. RANSOM, presiding judge, the jury found a verdict of guilty. Several errors are assigned, all of which are founded upon the indictment, and appear in the opinion of the court.

*Green & Dana*, for the plaintiff in error.

*N. Bacon*, for the people.

FELCH., J., delivered the opinion of the court.

1. It is assigned for error, that the first count in the indictment does not aver that the plaintiff in error was not employed in the mint of the United States. It is assumed that persons so employed, may rightfully have in their possession, and use, the instruments mentioned in this count of the indictment; that it is their employment to use them in coining; and it is contended that, inasmuch as the indictment does not allege that the defendant was not so employed, it does not appear that he has been guilty of a violation of the statute. The assumption upon which this objection rests is erroneous. Persons employed in the mint of the United States, have no right to possess and use the instruments described in this count of the indictment. The coining of money has been uniformly considered the prerogative of government, and has been exercised by all civilized nations. The establishment of a mint, the denomination of the coin to be issued, the weight of the coin, the proportion of pure gold and silver, and the quantum of alloy, the impression and superscription, are all fixed by law. These each government fixes for itself independent of others. The American coin is issued according to our own laws, and by men employed for that

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*Harian v. The People.*

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purpose in the mint of the United States. The act of congress establishing the mint, passed April 2d, 1792, provides for the coin of this nation, and authorizes the coinage of gold and silver under the authority of government. They who are employed in the mint under this act, are employed exclusively in making the coin of the government, as established by the act of congress. The coining of gold and silver, is, in fact, but giving the form adapted to use as a circulating medium, together with the stamp of the state, guarantying the weight, fineness and value of the piece.

The instruments which the plaintiff in error is charged in the indictment with having in his possession, are tools for making Mexican dollars. This is a foreign coin. It is stamped by the government of the place where it is coined, and its impress only shows that its value is certified by that government to be in accordance with the laws of that country. Foreign coin is made current here by the acts of congress, and those acts have fixed the rate at which it shall be received. But no act of congress has ever authorized the making of foreign coin at the mint of the United States, nor are the officers of the mint lawfully in possession, with the right to use, of the instruments for making such coin. Even to show that the person charged with such an offense, was an officer of the mint, would not, therefore, excuse the crime; neither can the omission to allege that the defendant was not so employed, vitiate an indictment.

2. It is insisted also, as a second ground of error, that, the whole subject of coinage being committed by the constitution of the United States to the general government, jurisdiction of all offenses pertaining to it, or connected with it, is in the courts of the federal Union, to the exclusion of the state courts; and that, therefore, this court has no jurisdiction in this case.

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*Harian v. The People.*

In order to determine whether this ground of error is well taken, it will be necessary to inquire into the nature of our federal Union, and to ascertain what power or sovereignty has been yielded by the states to the government of the Union, by the constitution. In the capacity of a sovereign state, no one would deny to Michigan the right to adopt her own system of internal police, to prohibit the acts charged in the indictment, and to make them criminal, to fix the punishment and to provide for the trial of the offense by the courts of the state. Is this power yielded to the government of the Union? Is the jurisdiction of the federal courts over the whole subject of offenses for counterfeiting the current coin of the United States, exclusive of the jurisdiction of the state courts, or do both the federal and state courts possess concurrent jurisdiction in the premises?

By the constitution of the United States, certain powers are yielded by the individual states to the general government. In the 82d number of the *Federalist*, it is stated that the state governments would clearly retain all their original rights of sovereignty, which were not, by that constitution, exclusively delegated to the Union. The alienation of state power or sovereignty, would exist only in three cases: First, when the constitution in express terms granted an exclusive authority to the Union; secondly, when it granted in one instance an authority to the Union, and in another prohibited the states from exercising the like authority; and, thirdly, when it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. This early exposition of the constitution has been repeatedly and uniformly approved, by subsequent writers on the subject of constitutional law: *1 Kent's Com.*, 387; *Colden v. Bull*, 3 *Dall.*, 386; *Sturgess v. Crowningshield*, 4 *Wheat.*, 193; *Houston v. Moore*, 5

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*Harrison v. The People.*

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*Wheat.*, 1; 3 *Story on Const.*, 619; *Serg. Const. Law*, 275. And it is affirmed, by the same authorities, that a mere grant of power in affirmative terms, does not, *per se*, transfer an exclusive sovereignty on such subjects to the Union. In all cases not falling within either of the classes already mentioned, the states retain either the sole power, or a power which they may exercise concurrently with congress. This results not only from the general principles on which the Union is founded, but is within the letter of the tenth article of the amendments to the constitution, which declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

By the seventh section of the first article of the constitution, power is given to congress to coin money, regulate the value thereof, and of foreign coin; and also to provide for the punishment of counterfeiting the securities and current coin of the United States. By the tenth section of the same article, it is provided, that no state shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts.

An examination of these and the other provisions of the constitution, shows that the power to coin money is ceded by the states to congress, and now resides exclusively in that body; and also that the clause giving power to congress to provide for punishing counterfeiting, contains no words either prohibiting a like power to the states, or giving exclusive power to congress. That power cannot, therefore, be considered as yielded by the states, within either of the two first branches of the rule laid down in the authorities before cited. Nor is such authority in the states, in my opinion, so totally contradictory and repugnant to the power delegated to the federal government, as to bring the case within the third branch of that rule.

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*Harlan v. The People.*

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The history of criminal jurisprudence shows that the ingenuity of criminals often requires a modification of criminal law, and increased severity of punishment; that, in the wide extent of this Union, the commission of crime may be more injurious to the interests of the community in one state than another; and that combinations for the commission of particular classes of offenses, may exist in one part of the Union, which are not found in another; and it might judiciously be reserved to the several states to apply such speedy and timely legislation as the exigency of the case might require, within her own borders, without waiting for the more tardy or less specific act of congress on the subject.

It is true, as has been argued at the bar, that this rule may lead in some instances to disparity of punishment for the same act; but, it is equally true, that there may be reasons for such disparity of punishing in the different states; and as each legislature fixes its own penalty to a violation of the statute, such uniformity is not to be expected. It can, at all events, be no argument against a concurrent jurisdiction.

It is also objected to the jurisdiction of the state court, that the executive of the state could not pardon the convict, for the reason that the offense is against the United States. We answer, the offense charged is for a violation of the laws of our own state, and not of the United States, and the power of the executive is as perfect in this case as in any other.

The objection is also urged, that a conviction in the state court would be no bar to an indictment in the courts of the United States. But if such concurrent jurisdiction in fact exists, we apprehend such conviction would be admitted in federal courts as a bar. This would follow necessarily from the existence of a concurrent jurisdiction, even if it did not come strictly within the provision of the seventh

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*Harian v. The People.*

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article of the amendments of the constitution : *Serg. Const. Law*, 298; *Houston v. Moore*, 5 *Wheat.*, 31.

It is claimed that the second section of the third article of the constitution gives exclusive jurisdiction to the courts of the Union, in all cases therein mentioned. This section provides, that the judicial power shall extend to all cases in law and equity, arising under the constitution, the law of the United States, and treaties made, and which shall be made under their authority. How far this article confers exclusive power on the courts of the Union, does not seem to be fully settled by authorities. But it is admitted that the judicial power was unavoidably, in some cases, exclusive of all state authority, while in other cases a concurrent jurisdiction remained in the state tribunals: 1 *Kent's Com.*, 318. It is admitted that a difficulty may arise in cases growing out of the constitution alone, where no jurisdiction existed in the states anterior to the adoption of that instrument. But in cases where the states had such power originally, they still retain it, unless yielded to congress in one of the methods before mentioned: 3 *Story on Const.*, 618; 1 *Kent's Com.*, 318; *Serg. Const. Law*, 276. It is contended by the plaintiff in error, that no such jurisdiction in the matter now under consideration, existed in the states prior to adopting the constitution.

It is a matter of history, that some of the states at an early period, while yet colonies, established mints for the coining of money. Massachusetts, in 1652, established a mint for coining shillings, sixpences, and three-penny pieces. The proprietary of Maryland, in 1662, established a mint, and in 1676, the law was confirmed by the colony, and the coin became the common currency. The money of account of the whole country, was nominally that of England—the circulating medium was chiefly Spanish and Portuguese. Most of the colonies, at different times, legislated upon the subject of the currency, fixing its nom-

*Harian v. The People.*

inal value, and attaching penalties to a violation of the laws in reference to it. One effect of this diversity of legislation in the different colonies exists to this day, in the different value given in the several states in the Union to the shilling. In the reign of Queen Anne, an attempt was made by royal proclamation and an act of parliament, to put an end to this confusion, by fixing the value of the coin in the colonies; but the effort proved abortive.

Under the confederation, which immediately preceded the organization of government under the present constitution, there was delegated to the continental congress the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states: *Art. 9.* This provision recognizes the existence of the power of the states over the entire subject of coinage, but yielded to congress the power to regulate the alloy and value thereof. It is observable that under these articles, no power is given to the continental congress over foreign coin. The states delegated to them no power either to fix its value, or to punish for any violation of the public interests in reference to it. Under the second article of the confederation, the jurisdiction in this matter not having been delegated to congress, is, by express declaration, retained by the separate states. During the existence of the confederation, from the time of its adoption on the first of March, 1781, until the fourth of March, 1789, when the present constitution went into effect, much difficulty was in fact experienced from the legislation of the different states on this very subject. The feebleness of the continental congress in respect to this subject, the evils of a concurrent power in the states in reference to the coin, together with a total want of power in congress to regulate foreign coin, are described by the history of the times, as reasons, among others, for relinquishing the confederation, and adopting the present more

Harian v. The People.

perfect and permanent constitution. The whole subject of foreign coin, the regulation of its value, the making it a lawful tender, and the punishment for any violations of law in reference to it, remained in the states exclusively, until the adoption of the present constitution. And it is believed that most of the original states had passed laws in reference to this subject, which were in full force at the time of adopting the constitution. As late as 1816, an indictment was tried, and the prisoner convicted, under such a law, in the Constitutional Court of South Carolina.

This reference to the articles of confederation and the history of the period when they were in force, shows clearly, I think, that the jurisdiction over the subject of foreign coin, and the regulation of it, was in the states at the time of the adoption of the constitution ; and so far as the offense of counterfeiting such coin, or having in possession tools with intent to counterfeit it, is concerned, the states retained a concurrent jurisdiction after the constitution was adopted. Michigan having been admitted into the Union on an equal footing with the original states, has, of course, the same power, and the same right to enforce her laws by her own tribunals.

The most that could be claimed is, that congress had the power to make the jurisdiction of the federal courts exclusive on this subject. The judiciary act of September 24, 1789, evidently contemplates, in all cases arising under the judicial power granted by the constitution, an exclusive jurisdiction in the courts of the United States. This, however, was a disability imposed by congress, only in cases where a jurisdiction before existed in the states ; and it was in the power of congress, by legislation, to remove the disability and restore concurrent jurisdiction. The act of congress providing for punishment for counterfeiting the current coin, passed April 21, 1806, contains a proviso that nothing therein contained should be con-

*Hariot v. The People.*

strued to deprive the courts of the individual states of jurisdiction, under the laws of the several states, over offenses made punishable by this act. This is not giving jurisdiction to a state court by act of congress, to enforce a law of congress. It is merely removing a disability imposed, or which might be supposed to have been imposed, by a previous act of congress, and restoring to the states the original jurisdiction over offenses against state laws, providing for the punishment of counterfeiting the current coin.

This question of concurrent jurisdiction in the state courts, has been directly decided in the courts of several of the states of this Union. In *Barb. Magistrate's Crim. Law*, 99, such concurrent jurisdiction is laid down as established by authorities. In the *State v. Antonio*, in the Constitutional Court of South Carolina, 3 *Wheel. Cr. Cases*, 508, the same questions were discussed, and the jurisdiction of the state court sustained. So in the *State v. Tuff*, 2 *Bail. S. C. Rep.*, 44; cited in 1 *Kent's Com.*, 397. So also, in *Chess v. The State*, 1 *Blackf.*, 198.

3. The last error assigned is that the indictment charges the offense to have been committed against the sovereignty of the people of this state, whereas in fact it should be against the sovereignty of the United States. The indictment is for a violation of a law of this state, and the constitution of the state provides for the conclusion of the indictment in the form here used. If it were an indictment for the violation of the law of congress, it should then charge the offense to be against the sovereignty of the United States; but in that event, the prosecution could not properly be sustained in a state court.

From a view of the whole case, we are satisfied that there is no error in the record, and the judgment of the court below must be affirmed.

*Judgment affirmed.*

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**Kimmell v. Willard's Administrators.**

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**Kimmell v. Willard's Administrators.**

A subsequent mortgage has a right, under the statute (R. S., 501, § 10), to redeem premises sold on foreclosure of a prior mortgage.

Where a mortgage is foreclosed by advertisement under the statute (R. S., 501, Ch. 8), for a default in the payment of one of several installments, and the mortgaged premises are bid off for the amount of such installment only, they are thereby forever disincumbered of the mortgage. (a)

*Semblé*, That a mortgagee might protect himself against such consequence of a statute foreclosure for one of several installments, either by bidding off the premises for the whole sum secured by the mortgage, or, by having them exposed to sale, charged expressly with the payment of the future installments.

**Appeal from the Court of Chancery.**

The complainant filed his bill in the court below, against the defendants, in the ordinary form, to foreclose a mortgage upon certain real estate in the village of Niles, Berrien county, executed by Willard in his life time, to wit, on the 25th day of November, 1835, and conditioned for the payment of \$1,000 in four years from the date of the mortgage, and interest thereon, payable annually. Both the principal and interest secured by the mortgage were due, when the bill was filed. The president, etc., of the Farmers and Mechanics' Bank, who, as subsequent incumbrancers of the mortgaged premises, were made parties, interposed a plea, stating that they were the assignees, for a valuable consideration, of a mortgage upon the premises, executed by one Pardon Wilder, to Willard in his life time; and that, having filed a bill for that purpose, they had obtained a decree of the Court of Chancery for a foreclosure of the same, and for a sale of the premises at a day

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(a) Subsequent statutes have endeavored to provide for foreclosure by advertisement for separate installments: S. L. 1844, p. 29, § 5; R. S. 1844, p. 500, § 2, subd. 4; C. L. 1857, § 5178; C. L. 1871, § 6918. But the case of *McCurdy v. Clark*, 27 Mich., 44, shows with very imperfect success.

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*Kimmell v. Willard's Administrators.*

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not then named; that, on or about the 25th day of December, 1838, the complainant proceeded to foreclose the mortgage executed by Willard, and mentioned in the bill in this cause, by advertisement pursuant to the statute, claiming that there was due thereon \$210; and that such proceedings were had, that the premises were afterwards struck off and sold to the complainant, under the statute foreclosure, for the sum of \$235; that, on the 28th day of March, 1841, which was before the time for redemption of the premises had expired, the bank, as assignees from Willard of the mortgage executed by Wilder, tendered to the complainant the sum of \$282 (that being the amount for which the premises were bid off by him under the statute foreclosure, and interest at the rate of ten per cent per annum), and requested the complainant to be permitted to redeem the premises, which tender the complainant refused to accept. The plea concludes with the usual averment, that the bank had always been ready and willing to pay the said sum of \$282, and brought the same into court, etc. An answer in support of the plea was also filed with it, but this it is unnecessary to notice particularly.

The cause having been argued upon the bill, and the plea and answer of the bank, and the answer of the other defendants, the chancellor, on the 21st day of June, 1842, pronounced a final decree, sustaining the plea, and dismissing the bill with costs; to reverse which, an appeal was taken by the complainant to this court.

*N. Bacon*, for complainant.

*Greene & Dana*, for defendants.

WHIPPLE, J., delivered the opinion of the court.

The question which the facts in this case present for our determination, is, whether the premises described in

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*Kimmell v. Willard's Administrators.*

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the bill were disincumbered of the mortgage executed by Willard to the complainant, by the previous foreclosure of the same by advertisement, pursuant to the statute, for installments of interest due, and by the tender of the bank to the complainant, who became the purchaser of the premises on such foreclosure, of the amount due on the certificate of sale.

The determination of this question must depend chiefly upon the construction and effect given to the provisions of *Ch. 8, Tit. 3, part 3 of the Revised Statutes*, entitled "Of proceedings to foreclose and redeem mortgages," the only material provisions of which are the following :

"**Sec. 1.** Every mortgage of real estate, containing therein a power to the mortgagee or any other person, to sell the mortgaged premises, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner hereinafter specified."

"**Sec. 2.** To entitle any party to give a notice as herein-after prescribed, and to make such foreclosure, it shall be requisite :

"*First.* That some default in a condition of such mortgage shall have occurred, by which the power of sale became operative; and,

"*Second.* That no suit or proceeding shall have been instituted at law, to recover the debt," etc.

"Sections 3 and 4 prescribe the manner of conducting the proceedings."

"**Sec. 5.** When any real estate offered for sale by virtue of the provisions of this chapter, shall consist of several distinct lots, tracts, or parcels, such lots, tracts or parcels shall be separately exposed for sale; and no more of any real estate shall be exposed for sale than shall appear necessary to satisfy the mortgage."

"**Sec. 6.** Whenever any real estate shall be sold accord-

Kimmell v. Willard's Administrators

ing to the provisions of this chapter, the officer or other person making the sale, shall make and deliver to the purchaser, a certificate under his hand, setting forth a description of the premises sold, the sum paid for each distinct lot or parcel, and the time when the purchaser will be entitled to a deed," etc.

"SEC. 7. The officer or person making the sale shall, within ten days after the time of the sale, cause a duplicate of such certificate to be recorded in the book of mortgages in the registry of deeds of the county in which the premises are situated," etc.

SEC. 8 provides for the manner of perpetuating the evidence of the sale.

"SEC. 10. Within two years from the time when such sale shall have been made, the mortgagor, his executors, or administrators, or any person lawfully claiming from or under him or them, may redeem any estate sold, as herein-before provided, or any distinct lot or tract thereof, that may have been separately sold."

"SEC. 11. In such case, the person intending to redeem the estate sold, or any lot or tract thereof, shall pay to the purchaser," etc., "the sum which was bid on the sale of such estate, or on such lot or tract thereof as it is intended to redeem, together with the interest on that sum from the time of the sale at the rate of ten per cent a year."

"SEC. 12. Upon such payment being made by any person so entitled to redeem any real estate sold as before provided, the sale of the premises so redeemed, and the certificates of such sale, shall be null and void, and *the said premises shall be forever disincumbered of the mortgage by virtue of which they shall have been sold.*"

SEC. 13 provides that the officer making the sale shall execute to the purchaser a deed of the premises in case they are not redeemed.

Kimmell v. Willard's Administrators.

Sec. 16 provides that subsequent mortgagees shall have the benefit of any surplus money that may remain, after payment of the amount due on the mortgage by virtue of which the equities of the mortgagor were foreclosed.

1. Having thus stated the provisions of the statute, let us inquire, first, whether the president, directors and company of the Farmers and Mechanics' Bank had a right to redeem? If the language employed in the tenth section is to be interpreted according to its strict legal and technical sense, there can exist no doubt respecting their right in this particular. They were "persons claiming under the mortgagor." We know that it is competent for courts to restrain and limit the meaning of general terms employed in a statute, provided they are justified in so doing by the manifest intention of the law maker, to be gathered from the whole law, its scope and object; but in the present case, we can see no ground for the application of this rule of construction.

2. What was the necessary legal effect of the purchase of the premises, by the complainant, under the statute foreclosure? A literal and strict construction of the 12th section answers this question. The premises became forever disincumbered of the mortgage, by virtue of which they were sold. Is it within the legal competency of a court of equity to control the operation of language thus clear and strong? Certainly not, unless the other provisions of the statute will warrant it. A very critical examination of the whole chapter, and of the able and ingeniously written argument of the counsel for the complainant, has failed to convince us, that we would be justified in restraining the obvious import of the language contained in the 12th section. I think it clear that, without reference to that section, the direct consequence of a statute foreclosure for the payment of an installment, is, in fact, to disincumber the estate of that mortgage. The

*Kimmell v. Willard's Administrators.*

right of the mortgagor to regard the mortgaged premises as a further pledge for the payment of subsequent installments, is thereby exhausted.

It may be that, applied to the present case, such a construction would appear harsh and inequitable; but we are bound to expound the law as we find it; we cannot venture on ground which is forbidden us, and control or defeat the legislative will, when that will has been clearly expressed. Judicial legislation cannot and ought not to be tolerated, however consonant to the principles of natural justice it may be, to mold a law, so as to adapt it to the equities of each case as it arises. The constitution has wisely prescribed the sphere within which each department of the government is to revolve; and we may not, without doing violence to the constitution, overstep the boundaries so clearly defined for our action. We have felt every inclination to relieve the complainant from the difficulties which surround him; for, by so doing, we should advance the real justice of the case, without doing violence to the rights, either of the mortgagor or subsequent incumbrancers. But it is precisely one of the many embarrassments which have grown, and must continue to grow, out of the ever fluctuating legislation of the present day, and the absence, in many of our important laws, of that clearness and precision in language and style, which are in every point of view so desirable. The community must suffer the penalty, until an appropriate remedy can be applied. It is in no wise remarkable, that the acutest lawyers should have been misled, with respect to the effect of a foreclosure like the present case. The present is not the first instance, in which the statute in question has led professional gentlemen of high character into difficulty. We do not wish to be understood as affirming that there exists no remedy for the evil; for, according to our conception of the rights of a mortgagee

Kimmell v. Willard's Administrators.

we entertain no doubt that it would have been legally competent, in the present instance, for the party to have protected himself against the evils which have befallen him. He might, we think, have bidden for the premises, when exposed to sale, the whole amount unpaid on the mortgage, whether for interest or principal; and any attempt on the part of the mortgagor to enforce, in a court of law, the payment of the difference between the amount actually due and the amount of the bid, would have been averted by the interposition of a court of equity, which would, under the circumstances, regard the equitable rights of the mortgagee as countervailing the strict legal rights of the mortgagor. In other words, equity would regard the money realized from the sale, as the primary fund for the payment of installments not due; inasmuch as the effect of the sale would be to disincumber the estate of the mortgage, which before stood as a pledge for the payment of the debt. Upon this point we have no doubt.

Again, it would have violated no principle of law, to have exposed the premises for sale, charged expressly with the payment of the future installments. In such case, the sale would have discharged the estate of the mortgage, but still a court of equity would lend its aid to the mortgagee, and regard the estate in the hands of a purchaser as charged with the debt. This aid would be granted, not because of any claim arising out of, or by virtue of the mortgage, but in consequence of its having operated so as to discharge the mortgagor from all personal liability; and for the more obvious reason, that an agreement would be implied, as between the mortgagee and purchaser, to consider the balance due the former as a lien, in equity, upon the premises.

*Decree affirmed.*

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
STATE OF MICHIGAN,  
IN JANUARY TERM, 1844.

*P R E S E N T :*

HON. EPAPHRODITUS RANSOM, . . . . CHIEF JUSTICE.  
HON. CHARLES W. WHIPPLE,  
HON. ALPHEUS FELCH,  
HON. DANIEL GOODWIN, } JUSTICES.

MEMORANDUM. The Hon. Geo. MORELL, late chief justice of the Supreme Court and judge of the first circuit, left the bench on the expiration of his term of office, on the 18th day of July, 1843. On the 9th day of March, 1843, the Hon. EPAPHRODITUS RANSOM, was appointed chief justice, and re-appointed judge of the third circuit; the Hon. ALPHEUS FELCH, was re-appointed associate justice, and judge of the second circuit, and the Hon. DANIEL GOODWIN, was appointed associate justice, and judge of the first circuit, for the terms of office commencing, respectively, on the 18th day of July, 1843.

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The President, Directors and Company of the Michigan State Bank v. Eurotas P. Hastings, Charles G. Hammond, John J. Adam and Robert P. Eldredge.

The repeal of the charter of a banking incorporation, which contains no reservation of the power to repeal, is a violation of that provision of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts," and is therefore void.

A state cannot be sued in its own courts; but this rule applies only where the state is made a party defendant to the record; and where the defendants were the late

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NOTE.—See Michigan State Bank v. Hammond, post 527.

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*Michigan State Bank v. Hastings.*

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auditor-general, and his successor in office, the secretary of state, and state treasurer, and the complainants' bill sought to reach property held by them in their official capacity. *Held*, that the Court of Chancery had jurisdiction, although the state might be interested in the subject matter of the suit.

The rule which prohibits a Court of Chancery from making a decree unless all those who are substantially interested be made parties to the suit, is inapplicable in a case where it is not in the power of the complainants to make them parties.

The Michigan State Bank, being indebted to the state of Michigan, conveyed to the state, in satisfaction of such indebtedness, certain real and personal property. In the agreement for the conveyance of the property, between the bank and the commissioners empowered by the state to settle with the bank, it was declared that the assignment of the property was made upon, and subject to, the express condition, that the state should indemnify and save harmless the bank from and against certain claims and liabilities therein mentioned. *Held*, that this was a conveyance upon a condition subsequent, and that the property would revert to the bank on failure of the state to perform the condition.

*Held*, also, that there could be no breach of condition, until the bank was actually damaged; and that an allegation that the state had not paid a bond and mortgage of the bank, which was one of the liabilities mentioned in the condition, but had permitted the same to be foreclosed, and the mortgaged premises to be sold at a great sacrifice, much below their real value, and that it had refused to pay off and satisfy the balance still due on said bond, for which the bank had been threatened with a suit, did not show such damnification.

*Held*, also, that, treating the condition as a covenant to indemnify, the bank would not, upon an allegation of these facts as a breach of the covenant, be entitled to an equitable lien upon the property for the payment of the liabilities mentioned in the covenant.

*Held*, also, that a court of equity would not enforce a specific performance of the covenant, before the bank had been actually damaged; nor even afterwards, as this could only be done in a proceeding directly against the state, which could not be made a party defendant to a suit.

*Quere*, whether such condition could be treated as a covenant to indemnify.

After the execution of the agreement between the bank and the commissioners on behalf of the state, the state took possession of the property thereby conveyed, and exercised acts of ownership and control over it, and on the 17th day of February, 1842, the legislature of the state passed an act, constituting certain state officers trustees on behalf of the state, to take charge of the property, empowering them to dispose of it, requiring that the proceeds should be paid into the state treasury, and used for the redemption of state scrip, and expressly sanctioning the agreement, except so much thereof as purported to bind the state to indemnify the bank, or to

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Michigan State Bank v. Hastings

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*pay or advance money to discharge incumbrances, or for any other purpose, which portions were thereby expressly rejected.* (S. L., 1842, p. 110.) *Held*, that the state had not the power to hold the property conveyed, and yet reject the condition upon which the conveyance was made; and that so much of the act of February 17, 1842, as purported to do so, was unconstitutional and void.

*Held*, also, that the declaration, in the act of February 17, 1842, that the state rejected the condition, did not, in itself, constitute a breach of the condition.

*Held*, also, that by acting upon the agreement between the bank and the commissioners, by exercising acts of ownership over the property conveyed, and also by the act of February 17, 1842, the state had recognized and affirmed the act of the commissioners in making the agreement, whether the commissioners originally had power to agree to the condition therein contained or not.

#### Appeal from the Court of Chancery.

The complainants filed their original bill in the Court below, against Eurotas P. Hastings alone, setting forth the following facts :

In 1839, the complainants were indebted to the state of Michigan, in the sum of \$500,000, or thereabouts; and, in February of the same year, became embarrassed, and stopped payment. In February, 1840, the legislature passed an act authorizing the auditor-general, state treasurer, and secretary of state, for the time being, to settle with the bank upon such terms as they might deem equitable, and appointing them commissioners for that purpose (S. L., 1840, p. 9); but the bank refused to settle with them, until the forfeiture of its charter, incurred by reason of its failure to pay its liabilities in specie, was remitted. On the 28th day of March, 1840, the legislature passed an act, declaring that if the bank should settle with the commissioners under the law before mentioned, and should resume specie payments on or before the first day of April, 1841, then nothing done or suffered by the bank, previous to that act, should in any way affect their chartered privileges : S. L., 1840, p. 128. On the first day of May, thereafter, the complainants settled with the commissioners agreeably to the provisions of the act first mentioned, and

Michigan State Bank v. Hastings.

assigned, transferred, delivered, and set over to them, in payment of the debt due to the state, bills, notes, accounts, lands and other property, amounting to \$633,567.98. The following indenture was thereupon executed by the commissioners on behalf of the state, and by the president of the bank on behalf of the complainants, which contains the terms of the settlement:

“ This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and forty, between the president, directors, and company of the Michigan State Bank, of the first part, and Eurotas P. Hastings, auditor-general, Robert Stuart, treasurer, and Thomas Rowland, secretary of the state of Michigan, commissioners for and on behalf of the state of Michigan for the purpose of settling with the party of the first part, parties of the second part, witnesseth :

“ That the party of the first part, for the purpose aforesaid, doth hereby assign, transfer, and set over to the parties of the second part, all the beneficial interest of the party of the first part, in and to all the property, effects, notes, accounts, real estate, mortgage securities, and choses in action, contained in schedule marked A, hereto annexed, with all the rights, privileges and appurtenances thereunto belonging, and with all the collateral securities by the party of the first part, held, for and on account of them or any of them, in full payment and satisfaction of all debts and liabilities of the party of the first part, to the state of Michigan; subject, nevertheless, to all and any discrepancies in the accounts and demands, arising from errors or contingent claims, and also subject to all just charges of counsel and expenses heretofore accrued and hereafter to accrue, upon such as are in process of collection at law, or in chancery; and the party of the first part doth hereby authorize, constitute and appoint the parties of the second part, and each of them, their suc-

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Michigan State Bank v. Hastings.

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cessors and assigns, or such other person as may be appointed by the legislature, the attorneys of the party of the first part, to sell, convey, alien, lease, assign, collect, secure, commute and compromise, all and singular, the property and demands in said schedule described, in their own names, or in that of the party of the first part, but at their own proper costs and charges, and all deeds, leases and acquittances to give, necessary in the premises, hereby ratifying and confirming all their lawful acts and doings in the matters aforesaid. And the party of the first part doth hereby covenant and agree, to and with the parties of the second part, that it will grant to the said parties of the second part, their agent or attorney, at all reasonable times, access to such books and papers connected with the property and demands mentioned in said schedule A, as are or may be in its possession, and as shall and may be necessary, and to furnish all such information, from time to time, to the parties of the second part, as they may desire, and the party of the first part, or its officers, may be possessed of, or knowing to, in the premises.

“And the parties of the second part, by virtue of the authority vested in them, by an act entitled ‘An act authorizing the auditor-general, the state treasurer, and the secretary of state, for the time being, to settle with the Michigan State Bank,’ approved February 1st, A. D. 1840, and by an act entitled ‘An act in relation to the Michigan State Bank,’ approved March 28th, 1840, do hereby, in consideration of the conveyance, covenants and stipulations of the party of the first part, hereinbefore set forth, fully acquit and discharge the said party of the first part from all claims, debts, dues and demands against the said party of the first part, and in favor of the state of Michigan, and from all liability thereon, or on account of the premises, to the state of Michigan aforesaid.

“And it is hereby understood by and between the par-

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*Michigan State Bank v. Hastings.*

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ties of the first and second part, that the assignment of the property and effects contained in schedule A, is made upon and subject to the express condition that the state of Michigan shall indemnify and save harmless the party of the first part, and their grantors, immediate and remote, from and against the several claims and liabilities hereinafter specified, forever, viz: A certain bond and mortgage, executed by the party of the first part, to the Bank of Michigan, upon their banking house and lot, this day conveyed by the party of the first part to the auditor-general, subject to said mortgage, upon which there remains unpaid the principal sum of \$11,250; also, a certain bond and mortgage, executed by Lansing B. Mizner to James H. Wood, dated October 19th, A. D. 1838, on a house and lot this day conveyed by the party of the first part to the auditor-general, subject to said mortgage, upon which the principal sum of \$1,500 remains unpaid; also, a certain bond and mortgage, executed by Eurotas P. Hastings to William W. Miller, upon lots eight, nine, fifty-four and fifty-five, in section four, in the city of Detroit, this day conveyed by the party of the first part to the auditor-general, upon which the principal sum of \$10,000 remains unpaid; also, all and sundry claims by and in favor of attorneys and agents, for professional services and disbursements, in and about the collection and securing of all or any of the demands set forth in said schedule A, which have accrued, or may hereafter accrue, upon any collateral securities which are transferred to the state of Michigan, and more particularly set forth in schedule marked B, hereunto annexed. In testimony whereof," etc.

The bill states and charges that the state had realized a large amount of money from the property so assigned; that the money had gone into the state treasury; that the state had not repudiated the settlement; that it had taken no measures to indemnify and save harmless the complain-

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Michigan State Bank v. Hastings.

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ants from the bond and mortgage upon their banking house and lot, executed by the complainants to the Bank of Michigan, and mentioned in the said indenture, or from the other liabilities therein mentioned; but, that on the 17th day of February, 1842, the legislature passed an act constituting the auditor-general, state treasurer, and secretary of state, for the time being, trustees, on behalf of the state, to take charge of the assets and property so assigned to the state, and sanctioning the agreement entered into between the complainants and the commissioners under the act of March 28, 1840, except so much thereof as purported to bind the state to indemnify the complainants, or to pay or advance money to discharge incumbrances, or for any other purpose; which portions of said agreement were expressly rejected. The act also empowered the trustees to sell or lease the property, and to collect, compromise, or extend the time of payment of the debts assigned, and required, that the money which might be realized therefrom, should be paid into the state treasury, and used for the redemption of state scrip. (*S. L. 1842, p. 110.*) The bill then charges that the state had not paid the bond and mortgage given to the Bank of Michigan, but had permitted the same to be foreclosed, and the mortgaged property to be sold at a great sacrifice for much below its real value; and that it had refused to pay off and satisfy the balance still due on said bond, amounting to \$7,000, for which the complainants had been threatened with a suit.

The bill charged, also, that the state was insolvent and unable to pay its debts; that much of the property had been permitted to become worthless through inattention, and many of the debts had been lost from the same cause; and that from others, very large amounts of money had been realized by the state, which it was unwilling to refund to the complainants: that the settlement and agreement

Michigan State Bank v. Hastings.

could not be set aside or repudiated by the complainants, because it was beyond the power of the state to place the complainants in the same position they were in when the settlement was made; and that a large amount of the property so assigned by the complainants, was in the hands of the defendant, Eurotas P. Hastings, one of the commissioners; which amount was sufficient to pay the liabilities mentioned in the condition of the said assignment.

The complainants subsequently filed an amended bill, which, in addition to the matters contained in the original bill, stated, that most, if not all of the real estate conveyed by virtue of said settlement, was conveyed to Eurotas P. Hastings, auditor-general, and his successors in office, and had not been by him, or his successors, sold or transferred; that some parcels of it had been leased by Hastings, and were producing a large income, which was received by the acting auditor-general, or state treasurer, and appropriated to the use of the state; that the auditor-general, Charles G. Hammond, the treasurer of the state, John J. Adam, and the secretary of the state, Robert P. Eldredge, were in the possession and control of many parcels of the property assigned, and claimed the right as trustees under the act of February 17, 1842, before mentioned, to control and possess all of the same, on behalf of the state, including that portion of the property which remained in the possession of said Hastings, and had, since the filing of the original bill, by virtue of their pretended right, settled with one or more of the makers of the promissory notes so assigned, and still under the control of said Hastings; that all of the property and assets assigned, were in their possession and control, except such as were still in the possession of said Hastings, and that, as trustees as aforesaid, they were exercising all the means in their power to convert the same into available funds for the use of the state, regardless of the condition con-

Michigan State Bank v. Hastings.

tained in said indenture, and that no measures had been taken by the state or its officers to fulfill said condition.

The complainants then aver that they have faithfully and punctually fulfilled all the stipulations on their part to be fulfilled, in and by said settlement, and all the requirements of the several acts before referred to.

The complainants, among other things, prayed that the defendants might be adjudged trustees for their benefit, of the real and personal estate so assigned, and that so much thereof might be sold, as might be sufficient to pay off the debts mentioned in the condition of said indenture, and the proceeds thereof applied to the payment of said debts; and that the complainants might be saved harmless and indemnified therefrom. There was also a prayer for general relief.

To this bill the defendants interposed a general demurrer, which, after argument, was sustained by the chancellor, and the bill ordered to be dismissed. To reverse this order, the cause was appealed by the complainants to this court.

*Van Dyke & Harrington*, in support of the demurrer.

*Joy & Porter, contra.*

WHIPPLE, J., delivered the opinion of the court.

The demurrer in this case is general, and puts in issue the right of the complainants to an answer upon the case made by the bill.

1. In support of the demurrer it is contended, that, by the "Act to annul the corporate rights of certain banks and for other purposes," approved February 16, 1842 (*S. L. 1842, p. 56*), the charter of the Michigan State Bank was unconditionally repealed, and that, therefore, the court below had no jurisdiction of the case, there being, in fact, no such corporation as the Michigan State Bank. Whether the complainants had a legal existence after the date of

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*Michigan State Bank v. Hastings.*

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this repealing act, must depend upon the validity of the act. A corporation is a franchise, which, in England, is created by royal charter or by act of parliament. In the United States, corporations are generally created by act of the legislature. By the civil law, corporate communities, intended to be permanent, could not exist unless confirmed by the sovereign: *Brown's Civil Law*, 101-2. The power, therefore, of creating corporations, resides in the sovereign. In England, a corporation may be dissolved, first, by act of parliament; secondly, by loss of all its members, or of an integral part, by death or otherwise; thirdly, by the surrender of its franchises; and, fourthly, by forfeiture of its charter, through negligence or abuse of the privileges conferred by it. The authority of parliament to dissolve a corporation, results from the theory of the British constitution, which recognizes the omnipotency of parliament. But the legislative power of this state is abridged and controlled by the constitution of the United States, and by our own local constitution. Any legislative act contravening the provisions of either, would be absolutely void and inoperative. Does the act referred to contravene any provision of either the federal or our state constitution? If this question was an original one, I should feel bound to give to the arguments of counsel the most careful and deliberate consideration; but if there is any one question more firmly settled than another, it is, that "a private corporation, whether civil or eleemosynary, is a contract between the government and the corporators; and the legislature cannot repeal, impair, or alter, the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judicially declared and ascertained:" 2 *Kent's Com.*, 306; 4 *Wheat.*, 318; 6 *Cranch*, 88; 7 *Id.*, 164; 9 *Id.*, 43, 292. If the question was now open for discussion, it might well be doubted whether the mere grant of a

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*Michigan State Bank v. Hastings.*

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*franchise*, as in the present case, was a contract within the true meaning and spirit of that provision of the constitution of the United States, which declares that "No state shall pass any law impairing the obligation of contracts." We might be permitted to look beyond the provision itself, into the reasons which led to its adoption. But we have before had occasion to remark that the decisions of the Supreme Court of the United States, upon all questions arising under the constitution, are final and conclusive. They must bind the judgment, although the understanding may not always be convinced. If it were otherwise, the consequences would be disastrous in the extreme. We should have a constitution, it is true, but uncertainty and instability would be impressed upon it, and there would be jarring and discordant conflicts of decision between the federal and state judicial tribunals. I feel bound, therefore, to disregard the act repealing the charter of the Michigan State Bank. I must treat it as void and nugatory.

2. It is insisted that the *state* is the *real* party in interest, and that, for this reason, the court below had no jurisdiction of the case. The demurrer was sustained by the court below upon the sole ground that the state was, in fact, the party defendant: *Walk. Ch.*, 9. And as the chancellor gave no opinion upon the several other points raised by the case, and which, it is understood, were argued before him, it is fair to presume that he entertained a strong conviction of the correctness of his views upon this single question. This consideration alone has induced me to give to this point a very full and careful examination, the result of which has been the undoubting conviction, that, notwithstanding the state is directly interested in the event of this suit, yet this circumstance constituted no objection to the jurisdiction of the Court of Chancery,

Michigan State Bank v. Hastings.

and that the demurrer cannot be sustained upon this ground.

The principle is well settled that, while a state may sue, it cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction. This is done in cases where the state claims something in opposition to a claim set up by an individual, and where the controversy depends upon the solution of legal principles involved in intricacy and doubt. These questions can be best determined by the judiciary; and an act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary. The method, at common law, of obtaining possession or restitution from the crown, of real or personal property, is by what is termed a petition of right; and Blackstone states the general rule thus: "If any man has, in point of property, a just demand upon the king, he must petition him in his Court of Chancery, where his chancellor will administer right as matter of grace, though not upon compulsion;" 1 *Bl. Com.*, 203. This is consonant to what is laid down by writers on natural and public law. Puffendorf says that, "a subject, so long as he continues a subject, hath no way to oblige his prince to give him his due where he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him upon such contract in his own court, the action itself proceeds rather upon natural equity, than upon the municipal laws. For the end of that action is, not to compel the prince to observe the contract, but to persuade him." 2 *Pet. Cond.*, 646. It is useless, however, to multiply authorities upon the question as to whether a state can be sued in its own courts. The only remedy for a party who has entered into a contract with a state, is by an appeal to the

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Michigan State Bank v. Hastings.

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legislature, who, it is fair to presume, will, from motives of public duty, make provision for its full execution, and do ample justice to the party with whom it may have contracted; or else refer the case to the decision and judgment of the judiciary, by a special legislative enactment.

The real question for us to determine is, what is to be understood by the rule, admitted by both parties to be well established, that *a state cannot be sued in its own courts*; or, in other words, that a suit cannot be instituted against a state in its own courts. On the part of the defendants it is contended, that although the state is not, and could not have been made *a party to the record*, yet the bill, on its face, shows that the state is the party in interest; and this being the case, the court can no more take jurisdiction, than it could have done, had the state been made a party defendant to the bill, and appeared in that character upon the record. On the other hand, it is contended on the part of the complainants, that in cases where jurisdiction depends upon the party, it is *the party named in the record*; and that the court will not, upon a question of jurisdiction, stop to inquire as to the interest of third persons, not named in the record, and who may be affected by the judgment or decree.

Can it be said that a person is sued, or that a suit has been instituted against a person, when such person is not named as a party defendant in the proceedings in a cause, and does not appear in that character upon the record? I apprehend not. Can a person, in a suit at law, be considered as a party defendant, unless his name appears as such in the writ, declaration, and other pleadings filed in the orderly and regular course prescribed by law for conducting suits, and the practice of courts? He certainly cannot. Can a person be considered as a party defendant in a suit in chancery, unless he is made such party in the bill, and in the process by which defendants are legally

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*Michigan State Bank v. Hastings.*

brought into court? I think not. I have in vain searched for a case in the English books, where a person has been regarded as a party to a suit, who is not made one by the proceedings in the case, and does not appear as a party in the record. The *record* in all cases is to determine who are parties to a case. In this case nothing appears on the record to show that the state is, in a legal and technical sense, a party defendant. But, it is said that the interest of the present defendants is merely nominal, and that the state is the *real party* in interest, and of consequence the real party to the record. The determination of this question must depend upon the facts stated in the bill, and the law arising upon those facts. It may be that this assumption of counsel is not warranted by the law and the facts. It may turn out, that, *in point of law*, the state are not exclusively interested in the case; that they have no rightful interest in the subject matter of this suit; and that the present defendants are not merely nominal, but real parties in interest. But, before entering upon an extended examination of these questions, let it be assumed that the state has a direct legal interest in the subject matter of the suit, and of course in its result. Does it necessarily follow that the court below had no jurisdiction of the case? The act of 17th February, 1842 (*S. L.* 1842, *p.* 110), provides that the trustees therein named, should, in behalf of the state, take charge of the assets assigned by the Michigan State Bank, with power to lease, sell, or convey the same; and to pay into the treasury the moneys they may collect, to be used for the redemption of state scrip. The defendants, it is alleged in the bill, have now in their possession a large amount of the assets so assigned, and assume to hold and control the same by virtue of the act aforesaid. The right of the defendants, therefore, to hold, control, and dispose of the assets in question, is based upon that act. It is fair to presume, then, that

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Michigan State Bank v. Hastings.

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the defendants will carry into effect its provisions; indeed, it is charged in the bill, that they have converted into money a large portion of the assets, and are disposing of the same from time to time. Now, suppose that the act under which the defendants claim the right to hold these assets, is nugatory and void. It would follow, as a necessary legal inference, that their possession is tortious and their acts void. Suppose, also, that it should appear that the state, at the time the act referred to was passed, had, in point of law, no interest or property in those assets. Would it be contended, under such a state of things, that the preventive justice of the country could not be invoked by the complainants, to stay the proceedings of the defendants, under the other averments contained in the bill? It could not be contended, although the state were not a party to the record. The state need not be made a party to the record, for the reason that it would not, in the supposed case, have any legal interest in the subject matter of the suit; but, if a legal interest did actually exist, it could not be made a party, for the reason that a state cannot be sued. But shall it be said that there is no power to stay the arm of a state officer, acting under the authority of a law which is void? Must a party against whom the blow is aimed, await calmly until that blow is actually struck, and then seek a remedy, when that remedy would be utterly inefficient? Not so is the law. Upon a case made by a bill, showing the entire want of authority on the part of an officer to do an act, which act, when actually done, would leave the injured party remediless, a court of equity would grant its injunction to ward off the blow, although the state might be directly interested in having the act done. To illustrate my views upon this point: the state claims title to a tract of land, rendered valuable, chiefly in consequence of the timber growing on it; suppose the state were to put the land in possession of

Michigan State Bank v. Hastings.

an agent, with instructions to cut down the timber, and appropriate it to the uses designated by the state. Suppose one of its citizens, claiming title to the land under a grant from the state, should file his bill, showing himself the legal owner of the land, under a title derived directly from the state, and charging upon the agent of the state thus engaged under its authority, acts which amount to waste. Would a court of chancery refuse its interposition, because the defendants, who were committing the wrong and destroying the inheritance, were acting under the authority of the state, and because the state, which has an interest in the case, is not and could not be made a party? I think not. But suppose, after the timber has been actually cut and severed from the freehold, the claimant should bring replevin or detinue against the agent of the state, who was in actual possession of the timber. Would a court of law dismiss the cause for want of jurisdiction, upon proof of the fact that the defendant was acting under the authority of the state, and that the timber was the property of the state, that the state was directly interested in the event of the suit? I apprehend not, and that in this, as in other cases, the court would impose upon the defendant the necessity of establishing his defense by evidence. Again: Suppose that instead of treating the agent as a tort feasor, the claimant would waive the tort and bring *assumpsit* for money held by him and arising from the sale of the timber, under the authority of the state. Would a court of law turn the plaintiff out of court because the state claimed the money? I apprehend not. I might multiply such illustrations indefinitely, but will content myself with one or two others, which are familiar to our courts, and of frequent occurrence. Suppose the state, having obtained a judgment against A, levies an execution, founded on the judgment, upon property owned by B; the officer making the levy refuses to recognize

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*Michigan State Bank v. Hastings.*

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the claim of B, who thereupon brings replevin for the property; the officer appears and justifies under the judgment and execution; but these show that the state is the real party in interest; would the court, for this reason, assume that they had no jurisdiction of the cause? I take it not. They would say to the officer that his process commanded him to take the property of the judgment debtor, and not of a stranger, and that his acts were void. An individual imports goods from a foreign country, which the collector of a port claims are liable to duty; this is denied by the importer. In order to obtain possession of the goods, however, he pays to the collector the amount of duty demanded, protesting against its validity; an action is brought by the importer against the collector, to recover back the money thus illegally demanded by the collector, and by him paid. It is quite clear, that, in such a case, the real parties in interest are the importer and the United States; and yet the courts are in the daily habit of entertaining jurisdiction in such cases. The illustration is a very striking one in favor of the position, that it is the party to the record, and not the interest of strangers to that record in the subject matter of the suit, which determines the question of jurisdiction.

I am not, however, driven to the necessity of relying upon my own erring judgment in determining this question of jurisdiction, but draw support from a case of much celebrity which is familiar to the mind of every lawyer—I mean the case of *Osborn v. The Bank of the United States*, 9 Wheat., 788. I propose to examine that case somewhat critically, as I think it settles conclusively two questions decided in the case at bar. The Bank of the United States exhibited their bill in the Circuit Court of the United States, for the district of Ohio, praying that Osborn, the auditor of the state, might be restrained by injunction from proceeding against the bank, under an act of the state

Michigan State Bank v. Hastings.

of Ohio, entitled "An act to levy and collect a tax from all banks, and individuals, and companies and associations of individuals, that may transact banking business in this state, without being allowed to do so by the laws thereof." This act, after reciting that the Bank of the United States pursued its operations contrary to the laws of the state enacted that if, after the first day of the following September, the said bank, or any other, should continue to transact business in the state, it should be liable to an annual tax of \$5,000 on each office of discount and deposit; and that, on the fifteenth day of September, the auditor should charge such tax to the bank, and should make out his warrant, under his seal of office, directed to any person, commanding him to collect the said tax, etc. The bill, after reciting this act, stated that Osborn was the auditor of the state, and gave out, etc., that he would execute the said act. Upon this bill an order was made, awarding an injunction, etc., which was served on Osborn and one Harper, on the 18th of September. The affidavit of the officer who served the injunction, stated that he served the same on Harper, while on his way to Columbus with the money and funds on which the same were to operate, as he understood; and that the writ was served on Osborn before Harper reached Columbus.

A supplemental and amended bill was afterwards filed in September, 1820, making new parties. The amended bill charged, that subsequent to the service of the injunction and subpoena, Harper, who was employed by Osborn to collect the tax, proceeded to the office of the bank, in Chillicothe, and took therefrom \$100,000 in specie and bank-notes, belonging to, or in deposit with, the plaintiff; that this money was delivered to one Curry, who was the treasurer of the state, or to the defendant, Osborn, both of whom had notice of the seizure, and paid no consideration therefor, but received it to keep it a safe deposit;

*Michigan State Bank v. Hastings.*

that Curry kept the money until he delivered it over to one Sullivan, his successor in office; and that neither Curry nor Sullivan held the money in their character as treasurer, but as individuals. The bill prayed that Osborn, Curry and Sullivan, in their official and private characters, and Harper, might be made defendants, and enjoined from using or paying away the money taken from the bank, and that the money be returned, etc. Curry filed his answer, admitting, that Harper delivered to him on the 20th of September, 1819, the sum of \$98,000, the amount of the tax levied upon the bank, and that he passed the same to the credit of the state as revenue, but in fact kept it separate from other moneys until January or February, 1820, when the moneys in the treasury were seized upon by a committee of the house of representatives; that soon after he delivered over the said moneys to Sullivan, his successor, and took his receipt for the same. The answer of Sullivan, among other things, admits that he gave a receipt to the treasurer for the \$98,000, and held it only as state treasurer. The cause was heard upon the bill, and the answers of Curry and Sullivan, and a decree was made, directing the restoration of the money to the bank; from which decree an appeal was taken to the Supreme Court of the United States.

The cause was argued with uncommon power and ability by eminent counsel, and a learned opinion was pronounced by the late Chief Justice MARSHALL.

Among other grounds, the appellants claimed that the decree ought to be reversed, because, if any case was made by the bill proper for the interference of a court of chancery, it was against the state of Ohio, in which case the Circuit Court could not exercise jurisdiction. The reasoning of the chief justice upon this point is as follows:

“The bill is brought, it is said, for the purpose of pro-

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*Michigan State Bank v. Hastings.*

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tecting the bank in the exercise of a franchise, granted by a law of the United States, which franchise the state of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the state from executing the law. It is, then, a *controversy between the bank and the state of Ohio*. The interest of the state is direct and immediate, not consequential. The process of the court, though not directed against the state by name, *acts directly upon it*, by restraining its officers. The process, therefore, is *substantially, though not in form, against the state*, and the court ought not to proceed without making the state a party. If this cannot be done, the court cannot take jurisdiction of the cause."

"The full pressure of this argument" (says the chief justice) "is felt, and the difficulties it presents are acknowledged. *The direct interest of the state in the suit, as brought, is admitted*; and, had it been in the power of the bank to make it a party, *perhaps* no decree in the cause ought to have been pronounced, until the state was before the court. But this was not in the power of the bank. The eleventh amendment of the constitution has exempted a state from the suits of citizens of other states, or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents of the state, and on the property in their hands."

"The state of Ohio denies the existence of this power, and contends, that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a state, can be sustained against such agent, because they would be substantially against the state itself, in violation of the eleventh amendment of the constitution."

"The appellants admit, that the jurisdiction of the court is not ousted by any incidental or consequential interest which a state may have in the decision to be made,

Michigan State Bank v. Hastings.

but is to be considered as a party when the decision acts directly and immediately upon the state, through its officers."

"If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced, where any person has been considered as a party, who is not made so in the record."

After citing many instances to show that the Circuit Courts of the United States would exercise jurisdiction in cases where a state had a real interest, notwithstanding the inhibition contained in the eleventh amendment of the constitution, the chief justice thus states the opinion of the court: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record."

I think this case furnishes an unanswerable argument to the objection taken by the defendants to the jurisdiction of the court, grounded on the allegation that the state is substantially the party in interest. For, if the Circuit Court of the United States, notwithstanding the positive restriction contained in the amendment referred to, could assume jurisdiction in a case where a state had a direct and immediate interest in the event of the suit, I know of no reason why a court of chancery may not, in a proper case, exercise a like jurisdiction where the restraint is imposed, not by the constitution or a positive law, but by the general principles of the public or municipal law. If, in the case from which I have freely quoted, the Circuit Court of the United States, upon the facts disclosed in the bill, could interpose, by injunction, and finally decree restitution of money in the actual custody of the treasurer of the state of Ohio, I know of no reason why the Court of Chancery in this state might not exercise jurisdiction in the present case, and grant the relief prayed for, if

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*Michigan State Bank v. Hastings.*

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warranted by the facts stated in the bill, and which are admitted by the demurrer.

In the case last cited, the appellants claimed, also, that the appeal ought to be dismissed, because the case made in the bill did not warrant the interference of a court of chancery. "In examining this question," the chief justice remarks, "it is proper that the court should consider the real case and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, auditor of the state of Ohio, to restrain him from executing a law of that state, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred upon them by their charter, and by the constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, *who is a state officer*, from performing any official act enjoined by statute, and whether a court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnishes no authority or protection to the officer who is about to proceed under it. This must be assumed, because, in the arrangement of his argument, the counsel who opened the cause, has chosen to reserve that point for the last, and to contend that, *though the law be void*, no case is made out against the defendants. We suspend, also, the consideration of the question, whether the interest of the state of Ohio, as disclosed in the bill, shows a want of jurisdiction in the Circuit Court, which ought to have arrested its proceedings." "The sole inquiry, for the present is, whether, stripping the case of these objections, the plaintiffs below were entitled to relief in a court of equity, against the defendants, and to the protection of an injunction. The appellants expressly waive the extravagant proposition that a void act can afford protection to the person who executes

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Michigan State Bank v. Hastings.

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it, and admit the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law. The question, then, is reduced to the single inquiry, whether the case is cognizable in a court of equity." After reviewing the facts of the case, and the causes which justify courts of equity in interposing their authority for the protection of private rights, the chief justice proceeds to consider the objection made by the defendants in the court below, grounded on the fact that the party interested was not before the court, and that, therefore, the court could make no decree. Upon this point he says: "If the state of Ohio could have been made a party defendant, it can scarcely be denied, that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested, be made parties to the suit."

"This is certainly true, where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles, to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted, that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act, to the full extent of

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*Michigan State Bank v. Hastings.*

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the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing? We put out of view the character of the principal as a sovereign state, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, *if no other party can be brought before the court?*" Again, "Will it be said, that the action of trespass is the only remedy given for this injury? Can it be denied, that an action on the case, for money had and received to the plaintiff's use, might be maintained? We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us, for the opinion, that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party."

This opinion establishes the following propositions:

1. That the rule which prohibits a court of chancery from making a decree, until all those who are substantially interested, be made parties to the suit, is inapplicable to a case, when it is not in the power of the complainant to make them parties.
2. If, in such a case, the defendant be a mere agent, and not privileged by his connection with his principal, and would be responsible in a court of law for the whole injury, the preventive power of a court of chancery may be applied to him in a proper case.
3. That if an action of trespass would have lain against the defendants in that case, then case would also lie for money had and received.

And with respect to the circumstances which would

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*Michigan State Bank v. Hastings.*

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authorize an injunction, the chief justice decides, that it will issue :

- (1) To restrain an agent from paying over to his principal, if that principal would not be amenable to the law.
- (2) In cases where the agent could not make compensation for the injury.
- (3) In cases where the injury would be irreparable.

Applying to the case before them, these principles, the Supreme Court of the United States determined that, as the defendants took and held the money in controversy, without authority, and would be liable for the whole amount in an action at law, the remedy by bill in equity was apt and proper ; and decreed restitution.

Believing, then, that the case of *Osborn v. The Bank of the United States* establishes incontrovertibly the right of the court of chancery to take jurisdiction of the present case, notwithstanding the state is a party in interest ; and that its jurisdiction is not ousted for the reason that the state is not, and cannot be made a party ; it only remains for us to determine, whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants. This brings me to an examination of the merits of the case.

3. Whether the complainants are entitled to relief, must depend upon the facts stated in the bill, and which are admitted by the demurrer. These facts are somewhat complicated, and would savor of affectation not to admit that the law arising upon the facts is involved in some obscurity, arising, principally, from the misapplication of well established general principles, by elementary writers, and in adjudged cases.

To proceed understandingly, it becomes necessary to examine and determine, with accuracy, the true legal import of the agreement entered into between the complainants and the commissioners or agents appointed by the

Michigan State Bank v. Hastings.

state, to effect a settlement with the Michigan State Bank, in order to define the legal rights of the parties to that agreement. By referring to the indenture, it appears that the bank, for the purpose of settling with the state, assigned to Eurotas P. Hastings, auditor-general, Robert Stuart, state treasurer, and Thomas Rowland, secretary of state, all the interest in and to the property, real estate, choses in action, etc., mentioned and set forth in a schedule annexed to the indenture, and constituted the said Hastings, Stuart and Rowland, or such other persons as the legislature might appoint, their attorneys, to sell, convey, alien, lease, assign, collect, secure, commute and compromise the property and demands in the said schedule described, in their own names or in the name of the bank, ratifying and confirming all their lawful acts and doings. The bank also covenanted with the said commissioners, to grant to them, their agent or attorney, access to such books and papers connected with the property and demands aforesaid as might be in their possession, etc.

In consideration of which, the commissioners on their part agreed to receive the said property mentioned in the schedule annexed to said assignment, in full payment and satisfaction of all debts and liabilities of the bank to the state, and did, in and by said indenture, acquit and discharge the bank from all claims, debts, dues and demands against them and in favor of the state, and from all liability thereon. The following clause then appears in the indenture: "And it is hereby understood by and between the parties of the first and second part, that the assignment of the property and effects contained in said schedule A, is made upon and subject to the express condition, that the state of Michigan shall indemnify and save harmless the party of the first and their grantors, immediate and remote, from and against the claims and liabilities

Michigan State Bank v. Hastings.

hereinafter specified, forever, viz: a certain bond and mortgage executed by the party of the first part, to the Bank of Michigan, upon their banking house and lot, this day conveyed by the party of the first part, to the auditor-general, subject to said mortgage, upon which there remains unpaid the principal sum of \$11,210; also, a certain bond and mortgage executed by Lansing B. Mizner to James H. Wood, dated October 19, 1838, on a house and lot this day conveyed by the party of the first part, to the auditor-general subject to said mortgage, upon which the principal sum of \$1,500 remains unpaid; also, a certain bond and mortgage, executed by Eurotas P. Hastings to William W. Miller, upon lots eight, nine, fifty-four, and fifty-five, in section four in the city of Detroit, this day conveyed by the party of the first part, to the auditor-general, upon which the principal sum of \$10,000 remains unpaid; also, all and sundry claims by and in favor of attorneys and agents, for professional services and disbursements, in and about the collection and securing of all or any of the demands set forth in said schedule A, which have accrued, or may hereafter accrue, upon any collateral securities transferred to the state of Michigan, and more particularly set forth in schedule B, hereunto annexed." Such was the agreement between the bank and the commissioners appointed by the state. That agreement may, in short, be thus stated. In consideration of a debt of \$500,000, which the complainants acknowledge to be due by them to the state of Michigan, they actually assigned and conveyed to the defendants, the agents of the state, property appraised at the sum of over \$600,000; but the assignment and conveyance was made by the complainants, upon *the express condition*, that the state should indemnify and save harmless the bank from certain liabilities, etc., expressed in the condition.

Waiving the consideration of the question, as to the

Michigan State Bank v. Hastings.

authority of the commissioners, to make the agreement, it purports, on its face, to be an assignment, by the complainants, to the defendants, of certain real estate and choses in action, founded on a valuable consideration; but subject to a certain condition. What then is a condition, and what are its legal effects? Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created, or enlarged, or destroyed: *3 Keu's Com.*, 120; *Co. Litt.*, 201. The following definition is more full and satisfactory. "A condition is a restriction, or a qualification, annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantee does or omits to do a particular act, an estate shall commence, be enlarged, or defeated:" *2 Cruise's Dig.*, 2. Littleton divides them into two classes: 1. Estates upon condition implied, or in law; and, 2. Estates upon condition express or in deed: *Litt.*, § 325. The condition in the case before us belongs to the second class, and is a condition express, or in deed. The right to annex a condition to a conveyance, results from the power of alienation; and this power of alienation is an incident to the right of property. If then, that condition be precedent, and the act upon which the estate depends be not performed, the estate does not vest; but if the condition be subsequent, the estate does vest, and will continue to vest until defeated by a failure on the part of the grantee to perform the condition annexed to the estate; or, in other words, until there is a breach of the condition. If, for instance, a person have an estate in fee subject to a condition, he may convey or devise the same, and the grantee or devisee will continue to hold as though no qualification had been annexed; but until the condition be performed, the estate is liable to be defeated; unless, indeed, the performance of the condition become impossible, by

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Michigan State Bank v. Hastings.

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the act of God, or of the individual who imposes it. "For if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet, the estate of the feoffee shall not be avoided:" *Co. Litt.*, § 384. "And so it is in case of a feoffment in fee with a condition subsequent that is impossible; the estate of the feoffee is absolute. And he that entereth for a condition broken shall be seized in his first estate, or of that estate which he had at the time of the estate made upon condition:" *Co. Litt.*, § 825.

Having shown, 1. That there was in this case a condition subsequent annexed to the estate; and, 2. The effect of a breach of such condition; it only remains for me to inquire, whether there has been a breach of the condition annexed to the estate granted by the complainants to the defendants, and if so, whether the facts stated in the bill will warrant a court of equity in granting the relief prayed for; or, if there has been no actual breach of the condition, whether, under all the circumstances, a court of equity should hold the estate in the hands of the defendants, subject to the payment of the debts mentioned in the condition.

But before entering upon the discussion of this branch of the case, it may not be considered unimportant to refer to a few adjudged cases, to show how inflexibly courts have adhered to the principle laid down by elementary writers, that upon breach of a condition, the estate, whether real or personal, reverts to him by whom the condition was annexed.

A and B, tenants in common of land, sold the wood growing thereon, with a proviso that it should be taken from the land within two years. B then conveyed his interest in the land to A. The purchaser of the wood transferred his right thereto to C, who had no notice of the proviso as to the time of taking it away. C cut the wood.

*Michigan State Bank v. Hastings*

but did not remove it within two years. Held, that the property in the wood reverted to A, and that C could not recover of him pay therefor, nor pay for cutting it: 1 *Metc.*, 271.

S. and D. entered into a written contract, by which the former agreed to sell, and the latter to purchase, a canal boat for \$300, provided that amount should be paid by D. in freighting wheat and flour on the canal under the direction of S. Held a conditional sale, and that no property vested in D., which could be sold under a *f. fa.* against him, until the purchase money was fully paid. Under a *bona fide* contract of this nature, the vendee is entitled to the possession of the thing sold for the purpose of paying for it in the manner stipulated; but it is to be thus possessed as the property of the vendor until the condition of payment is fulfilled: 2 *Hill*, 326. Chief Justice Nelson, in delivering the opinion of the court says: "The right of Dubois rested in contract and contract only, by virtue of which, he might, at a future day, acquire an interest in the property, but till the fulfillment of the condition, or payment of the purchase money, in the mode pointed out by the contract, nothing passed." The same doctrine is fully sustained by Mr. Justice Story, in the case of *De Wolf v. Babbitt*, 4 *Mason*, 289; and by Mr. Justice Washington, in the case of *Copeland v. Bosquet*, 4 *Wash. C. C. R.*, 593. See also the case of *Lawrence v. Gifford*, 17 *Pick.*, 366, and the case of *Haggerty v. Palmer*, 6 *Johns. Ch.*, 433.

In the case last cited, it appeared that goods were sold in the city of New York, to be paid for in approved indorsed notes, and it was the usage in that city when goods were sold, for the vendor to deliver them to the buyer when called for, and to send for the notes. The vendee, after he had received the goods, and before he was called upon for the notes, according to the terms of the sale,

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Michigan State Bank v. Hastings.

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stopped payment and assigned over the goods, with other property, to pay certain creditors. Held, by Kent, chancellor, that the delivery of the goods by the vendors, was conditional; that the vendee was a trustee for them until the notes were delivered; and that the assignment by the vendee was voluntary and fraudulent, and did not defeat the equitable lien of the vendors. In *Hussey v. Thornton*, 4 Mass., 405, it was held, that if A contracts to sell certain goods to B, on a credit, with a condition that B shall furnish a surety for the price, and delivers the goods without such surety furnished, but declaring that he should not consider them sold until the security should be given, the property remains in A, notwithstanding such delivery. These cases contain a full and ample recognition of the rule laid down in 2 *Kent's Com.*, 497. I now refer to the case of *Gray v. Blanchard*, 8 *Pick.*, 284, to show the strictness of the principle where conditions are annexed to a conveyance of real estate. "The defendant, being owner of a parcel of land with a dwelling-house thereon, adjoining, on the north, to land with a dwelling-house thereon belonging to his sister, facing to the south, conveyed to the tenant's grantor in fee simple, 'provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof.' After the sister has conveyed her land to a stranger, the tenant mortgages by deed reciting the foregoing provision, and afterward, while remaining in possession, makes windows in the north wall. Held, that the above clause was a condition, and that such breach of it worked a forfeiture of the estate, and gave the defendant a right to re-enter." The decisions are all based upon the general rule, "that when a man hath a thing, he may condition with it as he will;" and the duty of courts is to expound and give effect to all lawful contracts

Michigan State Bank v. Hastings.

made between parties, and not to make contracts for them.

The question now recurs, has there been a breach of the condition annexed to the estate granted by the complainants to the defendants, for the use of the state? The bill alleges that the state has never paid, or in any way satisfied the bond and mortgage executed by the complainants to the Bank of Michigan, but has permitted the mortgage to be foreclosed, and the banking house to be sold at a very great sacrifice, and much below its real value, and has refused to pay off and satisfy the balance of several thousand dollars due upon the said bond and mortgage, and that the complainants are threatened with a suit upon the said bond for the balance due thereon, by the owner thereof, which bond the state was bound and obliged to have paid long since; that the state is insolvent, etc.; and that they have without avail endeavored to induce the state to comply with the terms of the agreement entered into as aforesaid. I have already said that the words in the last clause of the agreement import a condition—a condition imposed by the grantors. But the clause also imports a covenant or agreement on the part of the state to indemnify. Suppose, therefore, that no words had been employed creating a condition, could the complainants, in a court of law, upon proof of the facts stated in the bill, have maintained an action upon the covenant? I apprehend that they could not, for the reason that the facts proved would not establish a breach of the covenant; and, at law, there can be no damages without an injury. The mere allegation that the complainants are threatened with a suit at law upon the bond, to recover the balance that may be due on it, would be insufficient to justify a recovery. In other words, a party cannot recover upon a covenant, or bond to indemnify, unless he has been actually damaged. *There being then no actual*

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Michigan State Bank v. Hastings.

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*breach of the condition* by the state, the complainants could not sustain a suit at law, and for the same reason, the property assigned to the defendants does not revert to the complainants. "Conditions subsequent (says Chancellor Kent, 4 *Com.*, 129) are not favored in law, and are construed strictly, because they tend to destroy estates; and the rigorous exactation of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience." See also *Co. Litt.*, 205, b, 219, b, and 8 *Co.*, 90, b. I do not of course mean to be understood as saying, that the exactation, in this case, would be unconscientious. Admitting, however, that there had been a breach of the condition on the part of the state, a court of equity would not lend its aid to divest an estate for the breach of a condition subsequent, although that aid will sometimes be extended to *relieve* against such a condition: 4 *Kent's Com.*, 130. It is to be observed here, that the agreement on the part of the state, was not to *pay*, as is supposed in that portion of the bill last quoted. The allegation is, "that the state has refused to *pay and satisfy* the balance of several thousand dollars," etc., "which the state was bound and obliged to *pay*," etc.; but the agreement was simply to *indemnify*. If the agreement on the part of the state had been to *pay*, the cause would have been stripped of many of the difficulties by which it is surrounded.

It follows, therefore, that if the complainants are entitled to any relief, that relief must be founded upon other facts disclosed in the bill, and not upon the ground that there has been a breach, on the part of the state, of the last clause in the indenture. It is claimed that a court of equity has jurisdiction of the case, and power to grant the relief prayed for, on two distinct grounds.

(1) It is contended that the vendor of land has a lien on the land for the amount of the purchase money, not only against the vendor himself, his heirs, and other privies in

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Michigan State Bank v. Hastings

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estate, but also against subsequent purchasers, having notice that the purchase money remains unpaid.

(2) That the court will compel a specific performance of a contract to indemnify and save harmless, although no damages have actually been sustained.

No principle is now better settled than that the vendee of lands, becomes a trustee to the vendor for the purchase money, or so much as remains unpaid: *2 Story on Eq.*, 463—4—5. In such a case the trust is implied, and arises from what are called equitable liens, of which courts of equity alone take cognizance. Such liens exist independently of any express agreement, and courts of equity enforce them, on the principle that a person having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it, and not pay the consideration money. The Roman law declared the lien to exist in natural justice; and this principle, which is now engravened in the equity jurisprudence both of England and this country, was borrowed from the civil law. By that law, the rule was equally applied to the sale of movable and of immovable property: *2 Story on Eq.*, 408. In England, however, the lien is usually confined to cases of the sale of immovables, and does not extend to movables where there has been a transfer of possession. It is insisted that an equitable lien exists in this case, for the reason that the covenant on the part of the state to indemnify, constituted part of the consideration for the sale by the complainants of the property mentioned in the assignment. Admit this to be true, yet it is difficult to perceive how a lien can exist before a breach of the covenant to indemnify. It may be that a recovery cannot be had against the bank by the person holding the bond, and if so, it is quite clear that no lien would exist. Whether a lien exists, then, must depend upon a contingency which may never happen. We are not to presume that a suit will be insti-

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Michigan State Bank v. Hastings.

tuted on the bond; much less are we to presume that a recovery will be had. It will be time enough to enforce a lien, when that lien attaches, and it certainly cannot attach in the present case, unless the complainants are damnedified. Equity will not *raise* a debt against the agreement of the parties, which agreement did not contemplate a debt or obligation until the complainants were damnedified. The debt being *raised*, equity might direct the property assigned to the defendants to be held as security for its payment; or, in other words, consider the debt due by the *vendee* as a debt due by the *property*. Courts of equity have applied the doctrine of equitable liens with great liberality, but I have in vain sought for a case which would justify the application of the principle to the present case. The whole argument of the complainants is based upon facts that are assumed, and not upon facts as they actually exist. There is no agreement on the part of the state to *pay and satisfy* the bonds and mortgages mentioned in the last clause of the indenture, but simply an agreement to *indemnify*. The legal liability of a covenantor in the first case depends upon no contingency; in the latter case it does. This distinction is obvious, and is recognized in all the adjudged cases on the subject. I shall forbear entering into an examination of those cases, as they have been fully considered in the opinion delivered by my brother GOODWIN, in the case of *Wheelock v. Rice*, *post*, 267. An equitable lien, therefore, does not exist upon the facts disclosed in the bill of complaint in this cause.

But, secondly, can the court enforce the agreement to indemnify? It is well settled that "courts of equity will decree the specific performance of a general covenant to indemnify, although it sounds only in damages, upon the same principle, that the court entertains bills *quia timet*." *2 Story's Com. on Eq.*, 145. The leading case in this coun-

Michigan State Bank v. Hastings.

try which asserts and indicates the jurisdiction of courts of equity in such cases, is *Champion v. Brown, Johns. Ch.*, 406. This case the counsel for the complainants considers directly in point, and as justifying the relief asked for in the present instance. Let us see how this view is sustained by the case. The bill was filed by Henry Champion and William L. Storrs, and the administrators and heirs of John Paddock, deceased, against John Brown and Jacob Brown, for the specific performance of an agreement, made on the 29th of August, 1816, by which Henry Champion and Lemuel Storrs agreed to sell and convey to Paddock 952 acres of land, for the sum of \$8,000; \$500 to be paid in cash, and the residue in six equal annual installments, with interest annually. Paddock died intestate November 16, 1816, and his administrators and heirs, being unable to perform the contract, for want of personal assets, on the 1st of June, 1818, entered into an agreement with the defendants, by which the latter covenanted and agreed, "*that they would take up and cancel*" the contract made between Champion and Storrs and Paddock, etc., by the first of August then next, or, in case that Champion, the survivor of Lemuel Storrs, should refuse to give up and cancel the said contract, then the defendants covenanted to *indemnify and save harmless* the administrators of Paddock, etc., from all damages, costs, charges and expenses which they might sustain, or be put to, on account of the claims, covenants and agreements in the said agreement contained. The administrators of Paddock covenanted, in their individual capacities, *to pay to the defendants all the moneys owing to them* from J. Paddock, deceased. Lemuel Storrs having died, all his interest in the contract became vested in William L. Storrs, one of the complainants. Soon after the agreement between the administrators of Paddock and the defendants, the latter

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Michigan State Bank v. Hastings.

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entered into possession of the land, etc. The bill prayed for a discovery, and that the defendants might be decreed specifically to perform the agreement between Champion and Storrs and Paddock, and for their indemnity; the heirs offering to ratify and confirm the conveyance of the land to the defendants in fee, etc. The chancellor, in giving his opinion, said, that the first and leading question was, whether the bill could be sustained by Champion and Storrs, as vendors, against the defendants, claiming by purchase under the vendee. The chancellor decided this question in the affirmative, and that the plaintiffs had a lien on the land for the purchase money. The next question was, whether the plaintiffs, who were administrators of Paddock, were entitled to any remedy, under the bill, upon the covenant of indemnity. In considering this question, the chancellor remarked, that the administrators were not personally liable on the contract of their intestate; and, as they had averred they had no assets, it was not perceived how they could be injured, and that this assertion of theirs created the great difficulty on the point; and, after citing several cases to show that equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the court entertains bills *quia timet*, he further remarked, that in the case before him, the defendants, by their covenant of indemnity, and purchase of the contract between Champion and Storrs and Paddock, undertook to relieve the estate of Paddock from the burden of that contract. This, said the chancellor, is the true intent and meaning of the agreement between the administrators and the defendants, and it is as just that they should be decreed to clear the representatives of Paddock, from the charge *which they assumed for them*, as it is that a principal debtor should exonerate his surety before suit brought, and not leave a cloud always hanging over him.

*Michigan State Bank v. Hastings.*

After a very critical examination of the whole agreement between the administrators and the defendants, the chancellor seems to have arrived at the following conclusion: "That the defendants intended to stand in the place of Paddock (the original vendee) and to assume the payments to Champion and Storrs, with which the estate of Paddock stood charged;" that "this was the good sense and meaning of this covenant of indemnity." A decree was accordingly made that the administrators were entitled to a specific performance of the covenants on the part of the defendants, and to an assessment of damages for breach thereof.

The leading English case relied upon by the chancellor in support of his views, is *Ranelagh v. Hays*, 1 Vern., 189. The facts in that case were as follows: "The Earl of Ranelagh assigned several shares of the excise in Ireland to Sir James Hays, and Sir James covenanted to save the earl harmless in respect of that assignment, and to stand in his place touching the payments to the king, and other matters that were to be performed by him." The plaintiff suggested in the bill, that he had been sued by the king for £20,000, and that the defendant ought to have paid it, etc. The lord keeper decreed that Sir James should perform his covenant, and that a master should report as often as a breach occurred, that the court might, if there should be occasion, direct a trial at law in a *quantum damnificatus*. The lord keeper compared it to the case of a counter-bond; where, although the *surety* is not troubled, yet at any time after the money became payable on the original bond, a court of equity will decree the principal to pay the debt.

These two cases, although differing in respect to the facts, were deemed to be governed by the same principles, and instead of supporting the views of the counsel by whom they were cited, go very far, I think, to show,

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Michigan State Bank v. Hastings.

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that the present case does not fall within the principles laid down either by the lord keeper or Chancellor Kent. In the case of *Champion v. Brown*, the chancellor says: "That the defendants intended to stand in the place of Paddock, and to assume the payments to Champion and Storrs, with which the estate of Paddock stood charged," and that "such was the good sense and meaning of the covenant of indemnity." The case of *Ranelaugh v. Hays*, states that "Hays was to stand in the place of the plaintiff, touching the payments to the king." The covenants in those cases, we are bound to presume, justified the construction put upon them; if so, it would be difficult to perceive, why, upon principle, the complainants were not entitled to the relief given them. But does the covenant in this case authorize us in saying, that the state intended to stand in the place of the bank, and assume the payments of the several bonds, etc., mentioned in the condition of the indenture? or that the state by the terms of the covenant was to stand in the place of the bank, touching the payments to the Bank of Michigan or holders of the bonds? I know of no rule that would justify me in putting such a construction upon the covenant in this case. We are not permitted to make a contract for the parties, by declaring that a covenant to indemnify means a covenant to pay. If the language of the covenant, taken in connection with the whole agreement, would warrant such a construction, we should feel bound so to construe it; but the language is plain; it admits of but one construction; and we cannot, without doing violence to the rules of law, give effect to what might have been the intention of the parties. We must judge of that intention by the agreement itself. But if we could so construe the indenture as to intend that in point of fact the covenant to indemnify meant a covenant to pay, as was the case in *Champion v. Brown*, and *Ranelaugh v. Hays*, insuperable difficulties would be interposed in the way of granting the relief sought for. What in such

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Michigan State Bank v. Hastings.

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a case is the mode of relief, and the measure of damages? The mode of relief is by a proceeding directly against the party who enters into the covenant. That party in the present case is the state, which is not and cannot be made a party to the suit. The measure of damages, to be ascertained by a trial at law in a *quantum damnificatus*, would be the actual injury growing out of a breach of the covenant. How can such a trial be had without the proper parties? Again, it may be well doubted, whether in point of law, there is such a covenant on the part of the state as would authorize its enforcement in a court of equity. I have treated the case, thus far, as though the covenant was not inserted in the indenture as a *condition annexed* to the estate. I have considered it as though it did not, of itself, constitute the condition; and it may be questionable, whether, had it been a covenant to *pay*, instead of a covenant to indemnify, a court of equity, would decree a specific performance. But the question does not necessarily arise, and no decision, therefore, is called for on this point.

It was urged in argument, that the state had, by a solemn legislative act, rejected the condition, and it was asked with emphasis, whether the state could thus reject the condition and still hold the property? The answer is, that the state cannot reject the condition, and hold the property; and that a breach of the condition will make a forfeiture of the estate granted. But the declaration of the state, that it rejects the condition, does not, of itself, constitute a breach of that condition, any more than the declaration of an individual who had executed a bond conditioned for the performance of covenants, that he rejected the condition, would constitute a breach of such condition. It is not in the power of a legislature to convert, by a legislative enactment, a conditional estate, into an absolute one. Such an act would involve a violation of the constitution

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Michigan State Bank v. Hastings.

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of the United States, and be pronounced nugatory and void. If a breach of the condition on the part of the state had been shown in the bill, I should have felt bound to treat the act directing the moneys arising from the sale of the assigned assets, to be appropriated towards the redemption of state scrip, as a violation of the vested rights of the complainants, and should have disregarded its provisions. For, a breach of condition once established, the state is divested of all right to that property ; it would at once revert to the complainants, and any act of the legislature appropriating that property to a public use, in a manner not recognized by the constitution or laws of the state, would be void.

Viewing the case in the light I do, it has become unnecessary to decide some questions raised by the counsel in argument, and involving principles of vital interest.

One point, however, may need a passing notice : I refer to the position assumed by counsel, that the legislature had a right to reject the condition annexed to the indenture, in the event that the commissioners exceeded their authority by agreeing to the condition. Whether there was an excess of power, or not, it is unnecessary to determine, and can have no influence on the ultimate decision of the rights of the defendants under the agreement. They had, as I have already intimated, the right to annex the condition. The state had the right, if there was no authority on the part of the commissioners, to repudiate their acts. This the state did not do. By acting for nearly two years upon the agreement, by exercising acts of ownership over the property, they affirmed the acts of their agents, whether those acts were originally binding and obligatory or not. But the act of 17th February, 1842, was a solemn act of recognition, one from which the state cannot escape. That part of the act rejecting the condition, was a nullity ; it is a declaration without any

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Michigan State Bank v. Hastings.

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meaning. If it would not be competent for an individual to separate an estate from the condition annexed to it, it would not be competent for the state to do so. What would be the effect of such an act? It would be to separate two things which in their nature are inseparable. In the language of the law, the condition is annexed to the estate; it doth always attend and wait upon the estate; it is knit to it. For this court then to affirm that such a power is lodged in the legislature, would be to affirm that that clause in the constitution, which prohibits a legislature from passing an act impairing the obligation of contracts, is a mere nullity.

The conclusion, then, of my mind is:

1. That the estate granted by the complainants to the defendants, was upon condition.
2. That whether the commissioners on the part of the state had the authority or not to annex the condition, cannot affect the legal rights of the complainants under the agreement; for the reason,
3. That the state has ratified and affirmed the acts of the commissioners, and is bound by the agreement made with the complainant.
4. That the condition in the last clause of the agreement was simply to indemnify.
5. That there has been no breach by the state of that condition; and,
6. That that part of the act of 17th February, 1842, which rejects the condition, is a mere nullity, and of no efficacy in the law.

The decree of the chancellor must be affirmed.

GOODWIN, J., did not participate in the decision, the cause having been argued before he took his seat upon the bench.

*Decree affirmed.*

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Wheelock v. Rice.

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**Charles Wheelock v. Ethan H. Rice, Paul B. Ring and Abel S. Fitch.**

*Non damnicatus* is not a proper plea to a declaration upon a covenant, executed on the dissolution of a copartnership between the plaintiff and one of the defendants, whereby the defendants covenanted to indemnify and save harmless the plaintiff from all liabilities created by the copartnership, from its commencement to its determination, *by assuming and paying the same in full when due*; the declaration averring that certain of those liabilities had become due, etc., and alleging a breach in the language of the covenant, and fully co-extensive with it.

*Held*, that after issue joined upon the joint plea to the merits of R. and F., co-defendants, R. might plead severally, *puis darrein continuance*, his discharge in bankruptcy subsequently obtained.

*Held*, also, that the plea *puis darrein continuance* was an abandonment by R. of the former joint plea of R. and F., which would afterwards stand as the several plea of F., to the same effect as if he had pleaded it sole.

This was an action of covenant. The declaration contained two counts.

The first count sets forth a copartnership between the plaintiff and the defendant Rice, under the name and style of Rice & Wheelock; a dissolution of the partnership by mutual consent, Nov. 7, 1839; and a covenant thereupon executed by the three defendants, "to indemnify and save harmless the said plaintiff, his executors, administrators and assigns, from all liabilities created by said firm of Rice & Wheelock, from the commencement to the determination of said partnership, by assuming and paying the same in full when due;" that certain liabilities of said firm, specially mentioned in the count, had become due, and the defendants had had notice thereof; and then alleges a breach of the covenant, in its language, and fully co-extensive with it.

The second count is substantially the same as the first, except the addition, in the statement of the covenant, that

*Wheelock v. Rice.*

the defendants "thereby covenanted and agreed to pay all the liabilities and debts of the said firm of Rice & Wheelock, which had been contracted between the commencement and termination thereof, when, and as they should severally become due." It then alleged a breach of the covenant thus stated, and co-extensive with it.

Two of the defendants, Fletcher and Ring, appeared and craved oyer of the instrument declared upon, which was granted. In the instrument as set out, after the recital of the copartnership, the contracting of liabilities by the firm for its objects, and the dissolution of the firm, the defendants "agree to save harmless and indemnify the said Wheelock, his executors, etc., from all liabilities created by said firm" (of Rice & Wheelock) "from the commencement to the determination of said partnership, *by assuming and paying the same in full when due.*" The two defendants then plead: (1) That the instrument was not their deed; (2) That the plaintiff had not, since, etc., "been, in any manner whatsoever, damaged for or by reason of any matter or cause in said covenant mentioned."

To the second plea there was a demurrer and joinder.

After these issues were joined, the defendant Ring moved for leave to file a plea *puis darrein continuance* of his discharge in bankruptcy, obtained since the last continuance. The plea offered was duly verified by affidavit.

The action was brought in the Jackson Circuit Court, and the Hon. A. FELCH, Presiding Judge, reserved the questions arising upon the demurrer to the second plea, and upon the motion of the defendant Ring, for leave to file a plea *puis darrein continuance* for the opinion of this court thereon.

*Farrand & Higby*, for the plaintiff.

*Johnson & Hawley*, for the defendants.

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Whealock v. Rice.

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GOODWIN, J., delivered the opinion of the court.

The first question presented is whether *non damnificatus* is a good plea to the declaration. The solution of this question depends upon the true construction and legal effect of the covenant. Is it a covenant to indemnify merely?

The rule on this subject is this: Where the covenant or (in the case of a bond with a condition) the condition is merely to indemnify, this plea is sufficient; but where it stipulates to perform any particular act, the performance must be specially pleaded. In 1 *Savnd.*, 117, n 1, it is laid down that "this plea cannot be pleaded where the condition is to *discharge or acquit* the plaintiff from such a bond, or other particular thing, for then the defendant must set forth affirmatively the special manner of performance;" and numerous authorities are cited in support of this position. "But" it is added, "it is otherwise where the condition is to discharge and acquit the plaintiff *from any damage* by reason of such bond or other particular thing, for that is in truth the same thing with a condition to indemnify and save harmless." The distinction taken, is between a bond or covenant to discharge or acquit from the obligation itself, and one to discharge or acquit from any damage by reason of the obligation. *Holmes v. Rhodes*, 1 *Bos. & Pull.*, 638, is strongly analogous to the present case. The action was upon a bond, conditioned that the obligors should pay the amount of a bond for which the plaintiff had become a surety, and *thereby* acquit, release and discharge the plaintiff, of and from the obligation, and all sums of money to grow due thereon, and damages, etc. The object was indemnity. But the condition was to acquit and discharge by payment. The plea of *non damnificatus* was interposed, but, after replication and demurrer, the court going back to the first error, held the plea bad. To the same effect is the case of

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Whealock v. Rice.

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*Woods v. Rowan*, 5 Johns., 42, and the various cases found in the New York Reports, on bonds to sheriffs for gaol liberties. These bonds are designed for the indemnity of the sheriff, but provide against an escape. The same principle is found in *Andrus v. Waring*, 2 Johns., 153, in the case of *Negus*, 7 Wend., 499, and in the case of *McClure v. Erwin*, 3 Cow., 213. In the last case the court say: "This is a good plea in all cases where the condition is to indemnify and save harmless; because it answers the condition in terms. But it is good in that case only. The plea should go to the right of action, not to the question of damages." Numerous authorities are cited sustaining the decision, and among them, those from 1 *Saund.*, above quoted.

To apply the rule to this case. What is, in fact, the covenant, according to its right construction? If it had stopped with the words "determination of said partnership," it would have been a covenant of indemnity merely. But the words "by assuming and paying the same when due," constitute an important addition. They provide a special manner and time of indemnity; in effect, by acquitting and discharging the plaintiff from the copartnership liabilities as they should become due, and that "in full." These words are not mere surplusage, as the plea would, in fact, make them. The plaintiff was not content with a general covenant to indemnify. He required that these "liabilities" (for that is the word used) should not hang over him; and so provided against this inconvenience by this portion of the covenant. It is obviously, therefore, a very material part of the covenant. In the second count of the declaration it is so treated and counted upon; and if the plea is good, this count is bad as going beyond the legal effect of the covenant. Suppose the covenant was that the covenantors would assume and pay the liabilities specified in full when due, and so, or thus, save

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Whealock v. Rice.

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harmless and indemnify the covenantee. Would the plea then meet it? Clearly not. And is not this the same in effect as such a covenant? It is difficult to perceive any difference. The covenant is for indemnity by assumption and payment of the debts when due, and the breaches assigned in each count are co-extensive with the covenant, embracing the assumption and payment. The plea goes only to the damages, and not to the assumption and payment; and, consequently, the breaches alleged stand admitted, and give the right to a recovery. The demurrer must therefore be sustained.

No question as to the rule of damages is now presented.

The second question presented is, whether the motion of the defendant Ring, for leave to plead his discharge in bankruptcy *puis darrein continuance*, ought to be granted.

It is objected by the plaintiff, that Ring having joined with Fitch in the other pleas going to the merits of the action, it is not now competent for him to plead a several plea, going to his personal discharge; that he cannot now sever at all, but must stand or fall by the issues already made in the cause. I have examined the cases cited by the plaintiff's counsel, but I do not perceive that they reach the question. They establish the proposition, pretty fully, that where one defendant joins with others in pleading to the merits, he cannot also sever and plead a matter in personal discharge. But these are all cases of pleading originally, and none of them cases where a plea was tendered *puis darrein continuance*.

To determine this question, it is necessary to consider the rules regulating these pleas, and their effect. They are, as their name imports, of matters which have arisen subsequent to the former pleadings and the last continuance of the cause, and which go to abate or bar the suit. As they tend to delay, great strictness is required in regard to them. They must be verified by oath; must be

*Whealock v. Rice.*

framed with great certainty; and but one of them can be pleaded. And, what is more material as to this question, by pleading one of these pleas, a defendant abandons all other pleas pleaded by him in the cause, and places the issue of the suit, as to him, entirely upon the single plea. A plea in abatement of this character may be pleaded, for a former plea was a waiver only of matters in abatement then existing. But upon such a plea too, the judgment, if against the party pleading it, is final, whether on a demurrer, or on trial, and not of *respondeas ouster*: 2 *Tidd's Pr.*, 847, 850-1; 1 *Chit. Pl.*, 635-6. The effect, then, of this plea, if received, is an abandonment by this defendant of the pleas formerly pleaded by him, and as respects him they are off the record; though they may stand as the several pleas of the other defendant, to the same effect as if he had pleaded them sole. The defendant pleading this plea, if it be received, will not therefore stand in the position of defending with the other defendant jointly on the merits, and severally in respect to his personal discharge, as would be the result in the cases referred to. And if a defendant, who has pleaded in chief, may abandon his plea so pleaded, and plead in abatement a matter subsequently arising, I see no reason why he may not so abandon a joint plea, and interpose a several plea of a discharge obtained subsequently. The other defendant is not prejudiced; the plaintiff may follow up the issue as against him; and if the defendant pleading the discharge succeed, a *nolle prosequi* may be entered in respect to him, or he may be discharged by the judgment of the court, and the cause conducted to final judgment against the other defendants: 1 *Chit. Pl.*, 32, 33, 41. I am therefore of the opinion that the motion should be granted.

*Certified accordingly.*

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Brown v. Bissell.

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**Cullen Brown et al. v. Charles Bissell et al.**

A bill of exceptions, returned with a writ of error, appeared to have been signed after the writ was sued out. *Held*, That this was at most, whether at common law, or under the provisions of the statute (R. S., 383, § 16), a mere irregularity; which was waived by joinder in error. (a)

This was a motion, by the defendants in error, to strike from the record the bill of exceptions accompanying the writ of error and return thereto in this cause. The writ was sued out December 7th, 1843. The exceptions appear to have been signed December 9th. The plaintiffs in error had assigned errors, and the defendants joined in error in the common form, before the motion was made. The errors assigned were special, and mainly upon the matters in the bill of exceptions.

*G. E. Hand*, in support of the motion.

*E. C. Seaman, contra.*

**GOODWIN, J.**, delivered the opinion of the court.

It is insisted by the defendants in error, that the plaintiffs, by suing out the writ before the exceptions were signed, had waived them; that the bill subsequently signed is a nullity; and that being so the joinder is no waiver of the motion, and no admission that the bill is a part of the record. On the other hand, it is insisted that, under the statute, if the bill was signed during the term in which the exceptions were taken, it is well returned as a part of the record; and that, if not so, it is a mere irregularity, waived by the joinder in error.

The statute (R. S., 383, § 16) provides that, "Any party aggrieved," etc., may allege exceptions, "which, being reduced to writing and presented to the court before

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(a) See *Teller v. Willis*, 19 Mich., 389.

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Brown v. Bissell.

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the adjournment thereof without day, and being found conformable to the truth, shall be allowed and signed by the judges of the court, *and on being filed* shall become a part of the record in the cause, if the party alleging such exceptions shall so elect. (b) By this statute, the bill, when signed (which must be during the term when the exceptions are taken), is filed in the Circuit Court, and then, if the party who alleges the exceptions so elects, becomes a part of the record. When it comes into this court, it comes as a part of the return to the writ of error. In this case it is so returned, and, in the clerk's certificate, it is stated to be the bill signed, and directed by the judges of that court to be filed. Can it then, for the cause alleged, be considered a nullity? Under the provisions of the statute referred to, we think it cannot; and that the fact complained of would, at most, be a mere technical irregularity, which is, therefore, of course, cured by the joinder in error. Suppose the plaintiff, upon discovering the mistake complained of, had discontinued his writ before the return; could he not then have taken a second writ, and had the bill returned with the record?

Our statute differs materially from the English statute on this subject. In that, it is expressly provided, that when an exception is sealed, and, upon the return of the record, "the exception is not found in the roll, and the party show the exception written, with the seal of the justice affixed, the justice shall be commanded that he appear at a certain day, to confess or deny his seal; and, if the justice cannot deny his seal, judgment shall be given according to the exception, as it may be allowed or disallowed:" *Tidd's Pr.*, 862-3. Under our statute no such proceeding is had; and the bill of exceptions is certified from the court below, with, and as a part of, the record there.

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(b) See C. L. 1871, §§ 6031, 6035.

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*Brown v. Bissell.*

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But under the English statute, and the practice under it, this motion could scarcely prevail. It is alleged that the suing out of the writ before the signing of the exceptions, being a waiver of them, the bill signed afterwards is a nullity. From the case referred to in support of this rule, in *Tidd's Pr.*, 861, it appears that a motion was made in the exchequer chamber, in a case brought up there on error to the King's Bench, for a rule on the opposite party, that a bill of exceptions should be settled by the judge in the court below, and appended to the transcript in the superior court. Two of the justices said the motion could not be granted *in that court*; one other said the writ and return were a waiver of the exceptions, and there was no authority to grant the relief sought; and the whole court concurred in denying the motion. In a later case however (*Willans v. Taylor*, 6 *Bing.*, 512; 2 *Barn. & Ad.*, 846), after error brought, a bill of exceptions, which had been previously sent to defendant's attorney, was settled; and, on a special application to the superior court (exchequer chamber), it was allowed to be tacked to the record there, upon terms, and the cause heard on the exceptions.

By the common law practice, then, the bill of exceptions could not be considered a nullity, and by it we think, therefore, the alleged irregularity would be waived, or cured, by the joinder in error. On the principles, then, of the common law, as well as under the provisions of our statute, the motion must be denied.

*Motion denied.*

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*People v. Hammond.*

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**The People ex rel. E. C. Seaman v. Charles G. Hammond,  
Auditor-General.**

On the sale of land for the taxes of 1837, the relator became the purchaser and received the county treasurer's certificate of sale, which, by the provisions of the statute under which the sale was made (*Laws 1838*, p. 96, § 15), would entitle him to a deed of the land within two years from the time of the sale; unless the same was sooner redeemed. Afterwards, and before the time of redemption had expired, the same land was again sold for the taxes of 1838, and, having been bid off on the last sale, for an amount exceeding the amount of taxes, interest and charges due thereon, the surplus was, under the provisions of the statute (*R. S. 1838*, 96, § 16), deposited in the state treasury, to the credit of the *owner or claimant* of the land, and remained there until after the time for redemption under the sale for the taxes of 1837 had expired, and a deed of the land had been executed, by the county treasurer, to the relator, in consummation of that sale. The relator then claimed this surplus money. *Held*, that he was not entitled to receive it, he not being the *owner* of the land within the meaning of the statute.

*Held*, that the relator did not become the *owner* of the land, until the deed to him, from the county treasurer, was executed.

*Held*, also, that the right to such surplus was personal, and did not follow with the title to the land; and that the person who was the *owner*, or who had the legal title to the land, when it was sold for the taxes of 1838, was entitled to receive it.

**Motion for *mandamus*.** On the 15th day of October, 1840, Seaman, the relator, became the purchaser of a certain quarter section of land, on a sale of the same by the proper county treasurer, for the delinquent taxes of the year 1837, and received from the treasurer a certificate of the sale, which entitled him to a deed of the land after the expiration of two years from the sale, unless the same was sooner redeemed. No redemption having been made, a deed of the land was, after the expiration of the two years, executed by the county treasurer, to the relator, in consummation of the sale. On the first Monday of August, 1842, and before the relator became entitled to the deed, the same land was again sold for the taxes of 1838, and was bid off by the purchaser, for a sum largely

People v. Hammond.

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exceeding the taxes, interest and costs chargeable thereon, leaving a surplus to be deposited, under the law then in force, with the state treasurer, "to the credit of the proper owner or claimant" of the land.

On the 15th day of December, 1842, the relator presented to the respondent, auditor-general of the state, his affidavit of the foregoing facts, and also his deed of the land from the county treasurer above mentioned, and demanded a warrant upon the state treasurer for the surplus money above mentioned, claiming that he was entitled to the money as owner or claimant of the land. The auditor-general refused to issue the warrant, and, upon affidavit of the above facts, application is now made to this court, by the relator, for a *mandamus* to compel him to do so.

*E. C. Seaman*, the relator, in support of the motion.

*E. Farnsworth*, attorney-general, *contra*.

*Ransom*, Ch. J., delivered the opinion of the court.

The sale of the land to the relator, for the unpaid tax of 1837, was made pursuant to the statute of 1833 (*Laws* 1833, p. 96, § 15), which provides that on the sale of any land for taxes, the treasurer shall give to the *purchaser* of any such land, a certificate in writing, describing the land purchased, and the sum paid therefor, and the time when the *purchaser* will be entitled to a deed for the said land; and, if the person claiming title to the land described in said certificate, shall not, within two years from the date thereof, pay the treasurer, for the use of the *purchaser*, his heirs or assigns, the sum mentioned in such certificate, together with the interest thereon, at the rate of 20 per cent per annum, from the date of the said certificate, the treasurer shall, at the expiration of the said two years, execute to the *purchaser*, his heirs or assigns, a conveyance

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People v. Hammond.

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of the lands so sold; which *conveyance* shall vest in the person to whom it shall be given, an absolute estate in fee simple, subject to the claims of the territory of Michigan thereon.

Under this provision the relator became entitled to a deed of the land in question, on the 5th day of October, 1842.

Prior to that day, the same land was again sold for the tax of 1838. The Revised Statutes, under which the last sale was made, provides (*R. S.*, 97, § 14), that after such payment shall have been made (referring to the amount bid for the land), the treasurer of the county shall give to the *purchaser*, a certificate in writing, describing the lands purchased, etc.

The 15th section of the same act provides, that all moneys received on such sales, shall be *forthwith* transmitted to the state treasurer, or deposited in some bank, under his direction, and subject to his order.

The 16th section enacts, that so much of the money so received as shall be equal to all the unpaid taxes, charges and interest thereon, shall be paid in the state treasury, and constitute a part of a fund for the redemption of certain stocks, "and the balance shall be deposited in the state treasury, to the credit of the proper *owner* or *claimant* of said parcel of land, which shall be entered on the books of said treasurer in a just and proper manner."

Section 17 provides that the *owner* of any land sold for taxes shall, *at all times*, be entitled to receive from the state treasurer the amount of money deposited in the treasury to the credit of such owner, upon making proof, satisfactory to the auditor-general, that he is the proper owner, and giving a receipt for the same.

Section 19 enacts, that the auditor-general shall, upon the presentation of the certificate, execute to the *purchaser*, his heirs or assigns, in the name of the people of this

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People v. Hammond.

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state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee.

It will be perceived that by the Revised Statutes, under which the relator asserts a right to the money in question, the *owner* or *claimant* only, is entitled to receive it from the treasurer.

That the person applying for the money, is the proper owner, within the intent and meaning of the statute, must be proved to the satisfaction of the auditor-general. Not that he can capriciously or arbitrarily decide whether or not the proof in a given case is satisfactory, but such proof must be adduced, as would be reasonably, legally sufficient, to establish the ownership of the claimant.

Are the facts, which are alleged to have been submitted to the respondent in this case, sufficient to prove that the relator was, on the first Monday of August, 1842, the *proper owner* of the land in question, so as to be entitled to receive the surplus money which accrued from the sale of it?

To justify an affirmative answer, it must appear that he was such *owner* on the day of the sale.

He contends that he was so; that, to adopt the language of his argument, the moment he purchased the land at the tax sale in October, 1840, he became the owner thereof; that his right, being in its nature complete and perfect, subject only to a defeasance or condition, could only be defeated by the former owner's paying certain moneys to the county treasurer. We think the statute will not bear the construction he claims for it.

It is to be borne in mind, that whatever *ownership*, or title to the land the relator had, was acquired under the statute of 1833.

In that statute, whenever mention is made of the person who buys land at a tax sale, he is denominated the *purchaser*, and no title whatever to the land sold, vests in

People v. Hammond.

him, until, at the expiration of two years, he receives the treasurer's deed, "which conveyance," says the statute, "shall vest in the person who receives it, an absolute estate in fee simple." Prior to that conveyance, he has only a lien upon the land for the repayment of the amount of the tax paid, with twenty per cent interest; he has no right to interfere with the possession of the owner; he cannot enter upon the land for any purpose whatever, nor can he control the rents and profits.

If, then, it was the conveyance by the treasurer, and not the purchase at the tax sale, which made the relator the owner of the land, he did not become such owner until the 5th day of October, 1842.

Was he, then, the owner, in time to entitle himself to the surplus money which he claims?

That is to be determined, as we have seen, by the Revised Statutes. In every section of the statute upon this subject in which mention is made of the original proprietor of the land, and of the person who buys it at the tax sale, a distinction that cannot be mistaken is observed; the first is denominated the *owner* or *claimant*; the latter is called the *purchaser*.

There is not a provision of either the statute of 1833, or of 1838, upon this subject, in which the person who bids off land at a tax sale, is called the owner, prior to his receiving the treasurer's deed; but, as I have before said, he is termed the purchaser, and the former proprietor the owner.

It is perfectly clear that the individual who has the legal title to the land at the time of the tax sale, is the owner, entitled, under the statute, to the surplus money, if any there be.

The moneys received on the tax sales are to be forthwith forwarded to the state treasurer, and he, on their

*People v. Hammond.*

receipt, is to place the surplus to the credit of the owner, who shall at all times be entitled to receive it.

The individual whose land was sold might have claimed and received the surplus the day following the sale, had it reached the state treasury so soon—two months before the relator's title vested. Suppose he had done so, and, upon proof of the facts now before us, the money had been paid to him? Will it be seriously contended that the relator could have successfully claimed it, either of the treasurer, or the person to whom, as owner, it had been paid? Clearly, he could not.

The surplus money produced by the tax sale, is the property of the person who has the legal title to the land at the time of the sale, and the moment the amount is ascertained and passed to his credit in the books of the treasurer, it is as absolutely his as though it were in his own keeping; and the right is personal—as unqualifiedly so as the ownership of any chattel; and although the surplus spoken of is produced by the sale of land, yet the right to receive and control it, no more follows the title to the land, than does the ownership of the cattle and farming utensils that a man may happen to have on his farm when it is sold for taxes, and the purchaser may, with as much propriety, claim a right to the latter as the former.

Is the right of the owner to the surplus changed or affected, in the slightest degree, by permitting the money to remain in deposit in the treasury, until his right to redeem his land shall have expired? No one will pretend it.

I confess I am unable to discover any principle, either of law or equity, that will sustain the claim preferred by the relator in this case.

The application must be denied.

*Mandamus refused.*

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People v. Oakland County Bank.

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**The People ex rel. Zephaniah Platt, Attorney-General, v.  
The President, Directors and Company of the Oakland  
County Bank.**

The transactions and acts of a corporation may be proved by entries made in its books.

Where, in an act of incorporation, it was provided that the same should be void, unless a certain sum of money was paid in, as part of the capital stock of the corporation, within two years from its passage, it was held, that, after five years had elapsed from the expiration of that period, it was too late to institute proceedings to obtain a forfeiture, on account of omission to comply with such provision. (a)

The court will lay down no universal rule in such case, but will decide whether the delay has been unreasonable or not, from the circumstances of each case.

An act repealing the charter of the "Bank of Oakland County," cannot be construed to be a repeal of the charter of "The President, Directors and Company of the Oakland County Bank."

It is not necessary that a repealing act should correspond exactly, in naming the corporation, with the act of incorporation which it is meant to repeal; but there must be such a correspondence as will leave no doubt of the intention of the legislature.

Where, by its charter, a bank is located in one county, and it establishes an agency in another county, where it receives deposits, and buys and sells exchange, it thereby violates its charter. (b)

The buying exchange by a bank is, in effect, discounting paper.

*Sembie*, That a bank may lawfully have an agency to redeem its bills, at a place other than that in which it is located by the charter.

*Quere* as to whether *quo warranto* or *scire facias* be the proper remedy by which to proceed against a corporation, for violating its charter.

This was an information in the nature of a *quo warranto*, requiring the defendants to show by what right they

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(a) 24 Mich., 396.

(b) See Walk. Ch., 90; 25 Mich., 241; 28 Mich., 241; 28 Mich., 494; 12 Mich., 9.

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*People v. Oakland County Bank.*

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exercised certain corporate privileges and franchises. No formal issues were joined, but the case was heard upon stipulation between the parties. The following were the grounds relied upon by the attorney-general, and those facts admitted by the stipulation, out of which the legal principles decided by the court arose.

1. That the act under which the defendants claimed to be incorporated, became void, by the failure of the defendants to comply with the terms of the last section thereof. The act was approved March 28, 1836 (*S. L.* 1836, p. 216). The last section declared, that unless the sum of \$15,000 in specie was paid into the bank, within two years after the passage of the act, the same should be void and of no effect. It was claimed that this sum was not paid in, within the time limited. The only evidence upon this point was certain entries in the books of the bank, showing that the money was paid in; and tending also to show that it was soon afterwards withdrawn from the bank.

2. That the charter of the bank was repealed by the "act to repeal the charters of certain banks and for other purposes," approved February 16, 1842 (*S. L.* 1842, p. 61), which, it was admitted, was passed by a vote of two-thirds of both branches of the legislature. This act repealed the charter of the "Bank of Oakland County." By the act of incorporation above mentioned, the corporate name of the defendants was, "The President, Directors and Company of the Oakland County Bank." The view taken by the court renders it unnecessary to state the evidence admitted by the stipulation, as to whether the defendants complied with the terms of the saving condition contained in the second section of this repealing act.

3. That the bank had violated its charter by the establishment of an agency at Detroit, in the county of Wayne.

People v. Oakland County Bank.

The charter required that the bank should be located in the county of Oakland. In September, 1843, an agency of the bank was established at Detroit, where the cashier of the bank resided, and a large part of the funds of the bank were kept. At this agency the defendants received and kept deposits, redeemed their bills, and, as incident to such redemption, bought and sold exchange. Affidavits were read showing that the agency was established in good faith, and without the intention to violate the charter. It was discontinued on the commencement of proceedings against the bank.

*Z. Platt, Attorney-General, for the people.*

*T. Romeyn, A. D. Fraser and D. Goodwin, for the defendants.*

**WHIPPLE, J.**, delivered the opinion of the court.

1. With respect to the first point, it was contended by the attorney-general that the books of the corporation, (the only testimony produced on either side upon the question), furnished conclusive evidence that \$15,000 in specie was not paid into the bank within two years after the passage of the act of incorporation; or at least, that the court would be warranted in inferring that, although the \$15,000 was paid in, yet it was immediately withdrawn, in fraud of the act creating the corporation. We have examined the extracts from the books furnished us by the attorney-general, and are free to admit that they are well calculated to cast suspicion upon the fairness of this part of the transactions of the original stockholders. Indeed it is difficult to arrive at a very satisfactory conclusion as to the true meaning of some of the entries. In a proceeding of this nature, however, which has for its object the forfeiture of corporate rights, I hold it to be the duty of the attorney-general to support the allegations

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People v. Oakland County Bank.

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upon which he relies to procure a judgment of forfeiture, by such evidence as leaves no doubt of their truth upon the minds of the court or jury, to whom the issue may be referred for determination. Now it does appear, by the books, that \$15,000 in specie was paid in, at the expiration of two years; and this entry, if considered separately, would be regarded as *prima facie* evidence that this part of the act was complied with, and would thus cast upon the attorney-general the burden of rebutting, by evidence clear and undoubted, the implication thus raised. I have already said that the other entries, immediately succeeding that relating to the payment of the \$15,000, are of a suspicious character. To me they are inexplicable; but this circumstance will not warrant this court in permitting a mere suspicion of unfairness, or even fraud, to overthrow a fact legally and properly proved by the books themselves. For the doctrine is well established, that the transactions and acts of a corporation may be proved by entries made in its books; and such entries are considered the best evidence of the acts of a corporation: *Any. & Ames on Corp.*, 378. Again, if the \$15,000 was in fact paid in and withdrawn, as argued by the attorney-general, a fraud of the grossest nature was perpetrated; and to support such a charge the evidence should be clear and conclusive, and not be left to inference. I do not desire to be understood as asserting that fraud can only be established by *express* proof. From its very nature, it can seldom be shown in this way; but, in the absence of such proof, it has always been deemed necessary to establish it by proof of such acts, as lead the mind irresistibly to the conclusion that the fraud has been perpetrated. In other words, the inference must be a *necessary consequence* from the acts done: *Matthews Pres. Ev.*, 29.

There are other circumstances, independent of those already stated, which would authorize this court to hesi-

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People v. Oakland County Bank.

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tate before pronouncing judgment against the defendants, upon the first ground assumed by the attorney-general. I refer now to the fact that the act incorporating the bank was passed about seven years since. Although there is no statute limiting the time within which proceedings of this nature shall be instituted, yet the Court of King's Bench, in England, has exercised a sound discretion in this respect, and refused to permit informations to be filed, at the instance of private individuals, if there has been unreasonable delay in invoking its extraordinary interposition. When the information is filed by the attorney-general, which may be done without a preliminary application to the court, that discretion will be exercised upon the hearing of the cause. This rule we think not only salutary, but reasonable; and it is to be applied to cases as they arise, according to circumstances, until the legislature (as in England) shall deem it proper to prescribe some uniform rule on the subject. Apply the rule, as it exists, to the facts in this case, and we think it would be unjust and unreasonable, even if the evidence of the non-payment of the \$15,000, as required by the act of incorporation, were stronger than it is, to oust the corporators of their franchises for this reason.

2. The next point to be considered is, whether the act incorporating the bank was repealed by the act of February 16th, 1842. The 4th section of the act of incorporation constitutes the defendants a body politic and corporate, by the name of the "*President, Directors and Company of the Oakland County Bank;*" the repealing act repeals the charter of "*The Bank of Oakland County.*" It is urged by the attorney-general, that the words, "the Bank of Oakland County," are sufficiently descriptive of the name of the defendants; and that, in any event, they are such a description as will justify the court in *intending* that the legislature had in view the repeal of the defendants'

People v. Oakland County Bank.

charter. I am not aware of any rule by which courts are guided in the construction of statutes, that will authorize us in asserting, either that the *description* is sufficient, or that the inference is warranted. "In applying the maxims of interpretation, the object is throughout, first to ascertain, and next to carry into effect, the *intentions* of the framer of the law:" *Dwar. on Stat.*, 46. "In exploring and discovering the *intention*, regard must be had to the words and context; and these words must be construed in their ordinary and familiar signification and import:" *Id.*, 47. Again, "the construction to be put upon an act must be such as is warranted by, or at least not repugnant to, the words of the act:" *Id.*, 48. We cannot, in order to give effect to what we may *suppose* to be the intention of the legislature, put upon the provisions of a statute a construction not supported by the words, though the consequence be to defeat the object of the act: *Id.* Apply the rules thus collected, and which are of universal application, to the question under discussion, and it will be difficult to support either of the propositions contended for in argument by the attorney-general. In this case we are not permitted to resort to testimony *aliunde*, to determine the intention of the legislature. That intention must be gathered from the words of the act itself; which, in our view, will not justify us in presuming that the repealing act was intended to include the defendants. This view of the question is abundantly established, not only by the canons of construction to which I have adverted, but by adjudged cases of the highest authority: *Cowp.*, 29; 2 *Strange*, 787.

In pronouncing this opinion, it is not intended to be asserted that there should be an exact correspondence, between the act creating and the one repealing a corporate charter, so far as the name of the corporation is concerned. All that is required is, that the repealing act should indi-

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People v. Oakland County Bank.

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cate with sufficient clearness the name of the corporation intended to be repealed. There should be such a correspondence as to leave no doubt of the intention of the legislature. Especially is this required, in acts which are in their nature highly penal.

3. The last, and most important question, remains to be considered; and that is, whether the establishment of an agency in the city of Detroit was a violation of the charter of the defendants. By the act of the incorporation, the stockholders were authorized to locate the bank in the county of Oakland. It follows, therefore, that, if the corporation has undertaken to exercise any of its franchises without that county, it has usurped an authority in violation of law, and must suffer the penalty which that law inflicts. The case admits that the bank redeemed its bills, kept deposits, and, as incident to such redemption, bought and sold exchange at the agency. Did these acts, or either of them separately considered, violate the law which gave a legal existence to the defendants? To determine this question, it is only necessary to define what business this bank was authorized, by the law of its creation, to do and perform. Such an examination will lead to the conclusion that it is a bank, not simply of discount, but also of deposit. It is quite manifest that the defendants could not establish in this city an office of discount. If so, may it not equally be intended that they cannot establish an office of *deposit*? To my mind the conclusion is irresistible. It requires no profound knowledge of the mysteries of banking, to know that the *amount* of discounts, in institutions which profess to be guided by safe rules, is regulated chiefly by two considerations; first, the amount of actual capital paid in, and secondly, the amount of deposits. If banks did not discount upon the strength of their deposits, their profits would be greatly diminished; and the discounts predicated upon such deposits, in a

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People v. Oakland County Bank.

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well regulated bank, having its regular customers, are always deemed an entirely safe operation.

But it is unnecessary to push our inquiries any further upon this point, as we are all clearly of opinion that, in this respect, there was the assumption of an authority not warranted by law. With regard to the purchase and sale of bills of exchange, in the manner and for the purposes stated in the case made, we are equally clear. It is said that the sale and purchase were not, *in fact*, the discounting of paper, but were simply *incident* to the redemption of the notes of the bank. This reasoning, although ingenious, will not bear scrutiny. Let us for a moment analyze this power claimed by the defendants, and see to what practical result it would lead. An individual has a draft of \$1,000 on New York, which he is desirous of converting into available means, and offers it for sale at the counter of the bank. The terms are agreed upon, the agent of the bank puts the bill in one drawer, and from another withdraws \$1,000 with the premium, in its own bills perhaps; and this ends the transaction. Now it is insisted by the counsel for defendants, that, although the draft is purchased, and purchased perhaps with the notes of the bank, yet it is received with a sort of mental reservation; with the intent to appropriate and apply it towards the redemption of its notes, and perhaps the very notes with which it was bought. Is it not manifest that this is an abuse of power; or if not, that it might lead to abuses of the grossest nature? Stripped of all disguise, is it not, in fact, discounting paper? Is it not the exercise of *banking* powers? We think it is. We do not desire to be understood as objecting to the right claimed by the defendants to redeem their bills in this city, in the mode in which country institutions usually redeem, but in so doing, we must insist that powers and privileges shall not be usurped, calculated to defeat the object and pur-

People v. Oakland County Bank.

pose of the grant, and in their consequences infinitely dangerous to the community.

The only remaining question is as to the appropriate remedy in cases of this character. It was urged upon the court, and insisted upon by the counsel for the defendants, that the remedy by *quo warranto* was misapplied, and that the only appropriate proceeding is by *scire facias*. In this particular case the question is unimportant; but, as a question of principle and practice, it is very desirable, as this is the first occasion upon which it has arisen, that it should be advisedly settled. I have devoted to the question as much time as I have been able to command, without arriving at a result satisfactory to my own mind. Consequently, the judgment of this court upon this branch of the cause must for the present be deferred. If the remedy has been misconceived, it will terminate the present proceeding. If, on the contrary, the proceeding is warranted by law, the court will then proceed to pass final judgment. In the mean time we feel authorized in saying that, in view of all the circumstances disclosed in the case made, seeing that the agency in question was probably established without any deliberate intention to violate the law, and that the same has been discontinued, we shall not feel disposed, as at present advised, to declare judgment of forfeiture against the defendants; but, in the exercise of that broad discretion with which we are clothed, to adapt the judgment to the circumstances of the case; admonishing those interested in the bank to see to it, that in the mean time, and for all time to come, they so conduct the affairs of the institution as not to render themselves obnoxious to legal proceedings. The public demand of us, and of all concerned in the administration of the law, the greatest vigilance in detecting, and punishing in the most exemplary manner, those who can and do wield so much power, when that power is so exerted as

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People v. Oakland County Bank.

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to be productive of evil instead of good. And, while the judgment in this case may not deprive the defendants of important privileges, a repetition of the offense will be visited with the severest penalties of the law.

GOODWIN, J., did not participate in the decision, he having participated in the argument of the cause before he took his seat upon the bench.

The cause having been heard on the information in the nature of a *quo warranto*, stipulations and proofs filed therein, and having been fully argued by the attorney-general in person, and by the counsel for the defendants, and mature deliberation being had thereupon, the court do hereby adjudge and declare, that the defendants, the said president, directors and company of the Oakland County Bank, are not guilty in the premises or in any part thereof, except as to the establishment, without lawful authority, of an agency in the city of Detroit; and as to that fact (to wit, the establishment of such agency) they are guilty.

And therefore it is considered, that the said defendants do pay to the people of the state of Michigan a fine of fifty dollars, and also the costs of this suit; and upon such payment being made, that the charter of the said defendants be deemed and held as legal and effectual, and that the said defendants may, without molestation or hinderance, use, have and enjoy all the rights, liberties, franchises and immunities conferred thereby; and that the said information, as to the said premises, be dismissed from this court.

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Preston v. Preston.

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**Marvin Preston v. Stephen H. Preston.**

The attorney of record cannot be made personally liable to the clerk of the court for his fees, for services rendered on behalf of the client in the progress of the cause, unless upon proof of his express promise to pay them, or of some practice, or course of dealing, between him and the clerk, from which such personal promise can be implied.

This was an action of *assumpsit*, brought by the plaintiff in the Calhoun Circuit Court, to recover certain fees due him for services rendered as clerk of that court. Plea, general issue. On the trial before the Hon. E. RANSOM, presiding judge, the plaintiff offered to prove that, as clerk of the court, he rendered the services for which the fees were claimed, in causes which were prosecuted and conducted in that court by the defendant as the attorney of record, and that, as to some portions of the services, the defendant applied to the plaintiff and procured them to be rendered. But no evidence was offered of any express agreement by the defendant to pay for the services, or of any course of dealing between the parties from which such an agreement could be implied. It was objected by the defendant that this evidence was insufficient to entitle the plaintiff to recover, and, the objection being sustained by the court, the plaintiff submitted to a nonsuit, with leave to move to set the same aside. A motion to set the nonsuit aside was afterwards made, and the questions arising upon the motion were reserved by the presiding judge for the opinion of this court thereon.

*A. Pratt*, for the plaintiff.

*V. L. Bradford*, for the defendant.

FELCH, J., delivered the opinion of the court.

This case involves the inquiry as to how far an attorney

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Preston v. Preston.

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of record in a cause is liable to the clerk of the court for his fees, for services rendered on behalf of the client whom he represents.

By the Revised Statutes (*R. S.*, 418, § 8), original writs are required to be indorsed by the attorney for the plaintiff before service. This seems intended merely as a matter of convenience. No provision of law has annexed to it any legal liability. When the plaintiff is a non-resident, the writ is required to be indorsed by some sufficient person, who is an inhabitant of the state, and such indorser is made liable, under certain restrictions, for such costs as shall be awarded against the plaintiff. We are aware, however, of no statutory provision imposing on the attorney, as such, the payment of the costs, either of the opposite party, or of his own client.

The law has imposed upon attorneys certain duties and liabilities, given them certain privileges and imposed certain disabilities. These, however, are said to be for the sake of the court and the suitors in it: *Grah. Pr.*, 37. No principle of law has imposed upon the attorney an absolute liability to pay for services rendered or expenses incurred by third persons, for the client, in the progress of the cause. In conducting the suit, so far as third persons are concerned, the attorney is simply the agent of his client. The rule of law is well settled, that an agent does not become personally liable, unless his principal is unknown, or there is no responsible principal, or the agent exceeds his powers, or becomes liable by an undertaking in his own name. From the very nature of the business done by the clerk of the court in the progress of a suit, he has before him a knowledge of the principal for whom the attorney acts, and that the latter acts only in his capacity of attorney. The statute fixes the amount to be paid to the clerk for the services required of him. He may refuse to perform any of those services until he receives

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Preston v. Preston.

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his pay, or a personal promise by the attorney to pay him. If, however, the clerk performs the services without requiring immediate payment, or a personal undertaking by the attorney to pay him, the credit must be understood to be given to the client, and not to the attorney. I have been unable to find any direct adjudication upon this question, but in *Robbins v. Bridge*, 3 *Mees. & Welsby*, 114, where an attempt was made by a witness who was subpoenaed in a cause by the attorney, to make the latter liable for his expenses, the court held that he was not personally responsible. And in *Hartop v. Juckes*, 2 *Maule & Selw.*, 439, the action was brought against the defendant, a solicitor in chancery, for services performed by the plaintiff as a messenger, under certain commissions of bankruptcy, in which he had been employed by the defendant. But the court denied his liability, and were of opinion that the solicitor was not to be regarded in general as a principal—that the messenger was aware that he was not the principal, and, upon the opening of the commission, might ascertain who was the petitioning creditor—and, though the solicitor was the medium through which it was convenient to the messenger to receive his bill of fees, that would not make him principal.

We do not intend to say that an attorney can, in no case, be made personally liable to the clerk for his fees, without proof of an express promise to pay them in each particular instance. If it should be shown that the clerk had uniformly refused credit to the client—that the attorney had been in the habit of paying such bills—that the clerk had repeatedly given him credit on his personal assumption—that there had, indeed, been any course of dealing between the parties, which would warrant the inference that it was the mutual understanding between them, that the credit should be given to the attorney, and not to his client, the attorney would be held personally liable. From

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Preston v. Preston.

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such facts, his promise to pay might be fairly implied. We apprehend that it is upon the ground of the existence, in some of the states, of some general custom, practice or course of dealing, from which it may be inferred that the credit is given to the attorney, instead of his client, that the liability of the attorney is there understood to exist. We are not aware of the existence in this state of any such general custom or course of dealing between clerks and attorneys.

We are therefore of opinion, that the attorney of record is not liable *in all cases* for services rendered by the clerk in the progress of a cause, nor even in all cases where he applies to the clerk and procures the services to be rendered; but that, in order to charge the attorney with the fees for such services, the plaintiff must prove, either an express promise to pay, or such custom, course of dealing, or understanding of the parties, as raises the legal presumption of a personal promise to pay.

The nonsuit below was therefore properly entered, and it must be so certified to the Circuit Court.

*Certified accordingly.*

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Platt v. Drake.

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**Zephaniah Platt v. Morgan L. Drake.**

Notice to an indorser of a promissory note, that the note "has been protested for non-payment, and that the holders look to him for payment of the same," is not a sufficient notice of dishonor. (a)

Such notice must contain words, directly, or by necessary construction, showing that the note has been presented for payment and payment refused.

A protest is a formal instrument, made by a notary public, alleging the due presentation and dishonor of a bill, and declaring that the notary protests the same for non-acceptance or non-payment, as the case may be; and the statement that a bill or note has been protested, refers rather to the making, by a notary, of the instrument denominated a protest, than to the acts which might authorize such protest to be made.

No protest of a promissory note is necessary.

The sufficiency, in itself, of a written notice of dishonor, is to be determined by the court as matter of law.

Case certified from Oakland Circuit Court. This was an action of *assumption* to recover the amount of a promissory note indorsed by the defendant. The only question presented by the facts (which were agreed upon by the parties), was, whether the following notice, which it was admitted correctly described the note declared upon, and was duly served upon the defendant, was, in itself, a sufficient notice of dishonor of the note.

"PONTIAC, March 10, 1838.

"Take notice, that a note drawn by Cornelius Roosevelt, to the order of Daniel S. Mercier, for \$466.62 dated Sept. 7, 1837, at six months after date, this day due, indorsed by said Daniel S. Mercier, and afterwards by you, has been *protested* for non-payment at the request of the Bank of Pontiac, and the holders look to you for payment of the same.

"SHERMAN STEVENS, Notary Public.

"To Morgan L. Drake, Esq."

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(a) This decision from the outset was much criticised and very generally disapproved. After having been affirmed as *res adjudicata* in *Newberry v. Trowbridge*, 4 Mich., 301, it was finally overruled in *Burkham v. Trowbridge*, 9 Mich., 302. See 13 Mich., 278; *Spiers v. Newberry*, 2 Doug., 425; *Snow v. Perkins*, 2 Mich., 226.

*Platt v. Drake.*

It was stipulated between the parties, that if the court should be of opinion that this was a sufficient notice of dishonor, judgment should be rendered for the plaintiff, otherwise for the defendant.

*T. Romeyn*, for the plaintiff, contended that no particular form of notice was necessary : *Story on Bills*, §§ 301, 390, and notes ; *Chit. on Bills*, 466 ; *Ransom v. Mack*, 2 *Hill*, 593, and cases there cited ; and that the form of the notice in the present case was sufficient : *Mills v. Bank of United States*, 11 *Wheat.*, 431 ; 6 *Pet. Cond.*, 377.

*H. H. Emmons*, for the defendant, contended that the notice should state in direct and unequivocal terms, that the note had been presented for payment and payment refused : *Solarte v. Palmer*, 7 *Bing.*, 530 ; *S. C.*, 1 *Bing. New Cas.*, 194 ; *Hartley v. Case*, 4 *Barn. & Cressw.*, 339 ; *Boulton v. Welsh*, 3 *Bing. New Cas.*, 688 ; *Chit. on Bills*, 470, note (s), 466 ; *Story on Bills*, § 301 ; and that the statement contained in the notice of dishonor in this case, that the note had been *protested*, was merely equivalent to a statement that a formal instrument, denominated a *protest* of the note, had been made by a notary—an act which would have been wholly superfluous, as no protest of any other negotiable paper, except a foreign bill of exchange, is ever necessary : *Chitty on Bills*, 170 ; and that it was not necessarily inferable from such a statement, that the note had been presented for payment and payment refused.

**FELCH, J.**, delivered the opinion of the court.

The liability of the defendant, as indorser, is a conditional liability, and it is for the plaintiff to show the performance of the conditions upon which it depends. The holder of a note undertakes to present it, at the proper time

Platt v. Drake

and place for payment; to allow no extra time and grant no indulgence for payment; and to give notice without delay to the indorser, of a failure in the attempt to procure payment: *Story on Bills*, § 112. And a default in any of these respects will discharge the party in respect to whom there has been such default.

The essential requisites of a notice of dishonor are, a description of the note; that it has been presented at the proper time and place for payment; that payment could not be obtained; and that the holder looks to the party to whom notice is sent for indemnity and satisfaction. No particular form of words is necessary, in which to convey this information to the party, but the words must be such as in direct terms, or by necessary implication, convey these several distinct ideas: *Story on Bills*, §§ 301, 390.

It is urged that the notice given to the defendant does not show that the note had been presented for payment, and payment refused. The words of the notice are that it "had been *protested* for non-payment." The word *protest* is applied to the formal instrument made by a notary public, alleging the due presentment and dishonor of a bill, and declaring that said notary does protest the same for non-payment or non-acceptance, as the case may be. This is official evidence of the fact in the case of foreign bills; but no such protest is necessary in the case of promissory notes, nor is it even evidence of the dishonor of a note. The statement that a note has been *protested* seems to me to refer, rather to the making by a notary of the instrument denominated a protest—to the perpetuating the evidence in that form—than to the acts which might authorize it to be made. If this be the meaning of the term protest, the notice in this case contained only a declaration that the notary had made his official protest, or solemn written declaration of the dishonor of the note. Such protest was unnecessary, and was no evidence of the facts

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Platt v. Drake.

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necessary to charge the indorser. A notice by a notary, that, at the request of the holder, he had made such protest, was not a notice that payment of the note had been demanded and refused, or that the note had been dishonored. It only asserted that the notary had declared it dishonored in the form of a protest—an instrument intended for evidence of the facts alleged in it, but in this case totally inadmissible as evidence, and unavailable to charge the indorser.

The English authorities seem almost uniformly to have adhered to the rule that the notice must contain words, either directly, or by necessary construction, showing the demand and refusal of payment. In *Hartley v. Case*, 4 *Barn. & Cressw.*, 339, the plaintiff wrote the defendant for payment of the bill indorsed by him, and threatening legal proceedings if payment was not made. The court held that the language used must be such as to convey notice to the party of what the bill is, and that payment of it has been refused by the acceptor. In *Solarte v. Palmer*, 7 *Bing.*, 530, decided in the Exchequer Chamber, the notice to the indorser, written by the plaintiff's attorneys, described the note, and stated that it had been put into their hands "with directions to take legal measures for the recovery thereof, unless immediately paid." Lord Tenterden had held, at *nisi prius*, that the notice was insufficient, and on a review of this decision, it was sustained. It was contended that, by the notice, the holder had sufficiently shown that he considered the indorser liable, and looked to him for payment. Tindal, C. J., delivering the opinion, said that the notice, "should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment of the amount." The same case was carried to the house of lords, and is reported in 1 *Bing. N. C.*, 194. It was there

*Platt v. Drake.*

urged that, as no settled form of words was necessary in a notice to an indorser, a threat to proceed at law against the indorser to collect the bill unless he paid it, necessarily implied that the bill had been dishonored. But all the judges present deemed it insufficient, and declared that such notice ought, in express terms, or by necessary implication, to convey full information that the bill had been dishonored. In *Boulton v. Welch*, 3 *Bing. N. C.*, 688, the declaration was against the defendant as indorser of a promissory note. The notice described the note, and informed the indorser that "it became due yesterday and is returned to me unpaid," and requested payment by the defendant. It was contended that a notice informing the indorser that the note became due and was returned unpaid, was sufficient to notify him of its dishonor. The court refer to the form of a protest of a bill of exchange, and the notice stated therein, and say of its contents, that, the "two important facts are, that payment of the bill has been demanded of the acceptor, and that payment has not been obtained. In like manner in the case of a promissory note, the notice should show a presentation to the maker, and a demand of payment and refusal."

It may be considered as a settled rule, that, when there is no dispute about the facts, the sufficiency of a written notice is to be determined by the court: *Ransom v. Mack*, 2 *Hill*, 587; and in this case we have only to inquire whether the statement that the note has been protested for non-payment, is equivalent to an allegation that the note was presented at the proper time and place, and payment not obtained. I think it is not. The information was simply that the holder had caused a notary to make his protest in the ordinary form and manner, as in the case of foreign bills—an act entirely unnecessary, and even nugatory, in the case of this note. The protesting of the note was not that which fixed the defendant's liability;

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Platt v. Drake.

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it was the presentation of the note, and the demand and refusal of payment; and these last should be stated in the notice, and not the former, to fix the indorser.

It is true that the protest of a notary, in the case of a foreign bill, presupposes a proper demand and refusal to pay the bill protested, and is evidence of it; but it is not sufficient to state a fact in the notice which it may be presumed would not exist without a regular demand and refusal. A notice that a certain witness would swear to due presentment and refusal, would imply the dishonor of the note, but clearly would not be a sufficient notice. So, a notice that the proper means had been taken to fix the indorser, would imply everything necessary for that purpose, but would be insufficient. The facts which are to be proved, in order to fix the liability of the indorser, are to be stated in the notice, and not other facts from which these may be presumed to exist. The only implication which can be allowed, is an implication from the words used, and not from extraneous facts alleged in the notice. It is of little consequence what words are used, or in what order they are placed, but they must be such as assert the fact that the note was presented at the proper time and place for payment, and payment not obtained. This is not done by the words used in this notice.

We think that the notice is, therefore, insufficient, and judgment must be entered in the Circuit Court for the defendant.

GOODWIN, J., being interested in the question, did not participate in the decision.

*Judgment for the defendant.*

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People v. Judges of the Jackson Circuit Court.

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**The People ex rel. Willing v. The Judges of Jackson Circuit Court.**

A brought replevin against B, in a justice's court, and recovered a judgment, which was afterwards reversed by the Circuit Court on *certiorari*; and, at the next term after the reversal of the judgment, B moved that court for an order, "that a jury be impaneled to assess the plaintiff's damages," which the court refused, ordering, "that the motion of the plaintiff in error, that a jury be impaneled and sworn to assess the value of the goods and chattels replevied, be denied." Whereupon, B moved this court for a *mandamus*, commanding the Circuit Court to impanel a jury to assess the value of the property. On such motion, it was held, that the Circuit Court had no such power as the *mandamus* would command them to exercise—the statute (R. S., 888, p. 595, § 6) applying only to actions originally brought in that court.

But held, further, that, in such a case, the Circuit Court would have power under §§ 170 and 185 of the justice's act of 1841 (S. L. 1841, p. 81), to award a restitution of the property.

Held, also, that the motion for assessment was made too late, the parties being out of court, when the term at which the judgment was reversed had expired.

Held, also, that the refusal of the Circuit Court to grant the motion for assessment of damages by a jury, was not a proper foundation for the application to this Court, for a *mandamus*, commanding the Circuit Court to impanel a jury to assess the value of the property replevied.

Motion for a *mandamus*. Jacob M. Wilsie brought replevin against Willing, the relator, in a justice's court, and recovered a judgment. The relator removed the cause by writ of *certiorari* to the Circuit Court for the county of Jackson, where the judgment of the justice was reversed, at the April term, 1842. At the ensuing October term, the relator, the plaintiff in the *certiorari*, moved the Circuit Court for judgment for costs, "and that a jury be called to assess the plaintiff's damages." Whereupon the court made an order "that the motion of the plaintiff in error, that a jury be impaneled and sworn to assess the value of the goods and chattels replevied, be denied." Upon these facts the relator applied for a *mandamus* to the Circuit

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*People v. Judges of the Jackson Circuit Court.*

Court, commanding that court to impanel a jury to assess the value of the property replevied on the process from the justice's court, to the end that judgment and execution might be had therefor in the Circuit Court.

*P. Farrand*, in support of the motion.

*D. Johnson, contra.*

GOODWIN, J., delivered the opinion of the court.

The principal point presented in argument is, whether, under the statutes, the court should have impaneled a jury to assess the value of the property replevied; and, as involved in this proposition, whether it had the authority to do so. The solution of this question depends on the construction to be given to the chapter in the Revised Statutes on Replevin (*R. S.*, 523), and the justice's act of 1841 (*S. L.* 1841, p.81).

The 6th section of the former contains the provision under which the power is claimed to exist. It provides that "if the plaintiff discontinue, become nonsuited, or judgment be rendered against him on demurrer, or if he shall otherwise fail to prosecute his suit to final judgment, then, in either of these cases, the court, on motion of the defendant, shall impanel and swear a jury, to inquire and assess the value of the goods and chattels so replevied." This provision applies to actions originally brought in the Circuit Court, as is evident from the whole chapter, and particularly the 2d section, which provides for the issuing of the writ from that court only. And, by the Revised Statutes, justices had no jurisdiction of actions of replevin, it being expressly excluded: *R. S.*, 389.

By section 170 of the justice's act of 1841, the jurisdiction is conferred, and they are required to proceed as nearly as may be, as is provided in the Revised Statutes, on the subject; and the writ of *certiorari* and appeal are

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People v. Judges of the Jackson Circuit Court.

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allowed "in the same manner, and with like effect, as upon other judgments rendered by justices of the peace." The jurisdiction of the Circuit Court by *caviliorari* is given and regulated expressly by statutes and no general supervisory power is given to that court as a court of error or review. Its powers and duties in respect to the judgment to be rendered on this writ, as prescribed in sections 132, 133, 134 and 135, of the justice's act alluded to (*L. 1841, p. 114*), and in none of them do we find the authority given, which is now claimed for it. Judgment is to be given as the right of the matter may appear, without regard to technical defects, etc.; the judgment below affirmed or reversed, in whole, or in part; and execution on the judgment rendered in the Circuit Court to issue as in other cases. By section 135, it is provided that if a judgment rendered before a justice be collected, and afterwards be reversed, the Circuit Court shall award restitution of the amount so collected, with seven per cent interest; satisfactory evidence of such collection being presented to the court, at the argument of the cause. This approaches nearer than any other provision, to the relief sought, but obviously does not embrace it. It goes no further than to authorize the court to award a restitution of the property replevied. This, I think, in connection with section 170, it does fully authorize. The relief sought, however, was well refused, and the motion for a *mandamus* must be denied.

There is, also, another reason, why I think the motion should be denied. The reversal of the judgment was in May, 1842, and the motion for an assessment was not made until the ensuing term. Judgment had been rendered, the term had passed, and the parties, strictly speaking, were out of court. The court had not been continued over, and they had no day therein further. I think,

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People v. Judges of the Jackson Circuit Court.

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for this reason, the motion made in the Circuit Court might well have been denied.

Further, the motion which appears in the papers, is for an assessment of *damages* by a jury, and not of the *value of the property*. The statute contemplates an assessment of *the value of the property* by a jury, and of damages by *the court*. The motion was for one thing, and the relief sought in the court below, and in this court, for another. Although this point was not made on the argument, I think that for this cause the motion might well have been denied.

The *mandamus* (at common law) is a high prerogative writ, which is granted only in a case where a party has a clear, strictly legal right, and no other remedy, and there would be otherwise a failure of justice. It is used very sparingly, and only when the right is entirely clear and apparent.

For all these reasons, then, I think the application must be refused.

*Mandamus refused.*

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Owners of the Ship Milwaukee v. Hale.

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## Owners of the Ship Milwaukee v. Hale et al.

The complaint under the "act to provide for the collection of demands against boats and vessels" (S. L. 1830, p. 70), (a) should contain every substantial averment, which would be necessary in a declaration, at common law, for the same cause of action; and it is governed by the rules which apply to declarations, in respect to joinder and misjoinder of counts.

A complaint under that statute contained four counts; two of which were, in substance, that the plaintiffs shipped on board the vessel, which was employed by the owners as common carriers, a certain quantity of wheat, and, in consideration that the plaintiffs promised to pay a certain price for the transportation, the owners of the vessel received the wheat on board, and agreed to proceed directly from the place of shipment to the port of destination, and deliver the same in good order, etc., but that they did not take care of, and securely convey and deliver the said wheat, but, on the contrary, the vessel was so carelessly managed, etc., that the wheat was lost and not delivered. The other two counts set forth a like shipment and undertaking to deliver, etc., pursuing the ordinary and accustomed route, without unnecessary deviation, etc., and alleged a deviation, during which the ship was assailed by a great storm and wrecked, etc., and the wheat was wet, damaged, and spoiled and wholly lost, etc., and not delivered. *Held*, that all of these counts were in *assumpsit*, and properly joined.

Where it was assigned for error, that it appeared from the record, that, to the declaration or complaint, which was in *assumpsit*, the defendant had pleaded two pleas, *non assumpsit* and not guilty, and that it did not appear that the jury had passed upon but one of the issues; *Held*, that either of the pleas was a full answer to the whole declaration, and, whether the declaration was in *assumpsit* or case, would be good after verdict; and that, as the plea of *non assumpsit* met the whole declaration, the plea of not guilty might be treated as a nullity, and stricken from the record.

Where it appeared from a record that the jury were "duly elected, tried and sworn," but not that they were "sworn well and truly to try the issue," etc.: *Held*, that this was no ground of error, and that the record might be amended in this respect, after error brought, in affirmance of the judgment.

Where a record showed that *talesmen* were called and sworn upon the jury, but it did not appear that they had the requisite qualifications of jurors: *Held*, that this was no ground of error, but that it would be presumed after verdict (no challenge appearing to have been taken upon that ground) that the jurors were qualified. (b)

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(a) This act has undergone many modifications. See R. S. 1846, ch. 122; C. L. 1857, ch. 140 (which was declared unconstitutional in some features in *Parsons v. Russell*, 7 Mich., 118); C. L. 1871, ch. 210.

(b) See *Bourke v. James*, 4 Mich., 336.

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Owners of the Ship Milwaukee v. Hale.

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By going to trial, a party waives objection on the ground of the want of proper qualifications of the jurors.

Also, objection to the sufficiency of the oath administered to the jury.

Adjournments of the court from day to day, during the same term, are not continuances, which require to be stated in the record.

Where it does not appear from the record that the jury retired to consult, they will be presumed to have found the verdict without leaving their seats.

### Error to Wayne Circuit Court.

This was an action commenced in the Circuit Court for the county of Wayne, under the act of 1839, providing for "the collection of demands against boats and vessels." The cause was tried at the May term of said court in 1842, when a verdict was found and judgment rendered for the plaintiffs below.

As appears from the record of the judgment, the complaint contained four counts, as follows: The first count sets forth in substance that, on the 14th of October, 1839, the plaintiffs, by their agents, at St. Joseph, Michigan, where the ship was lying, bound for Buffalo, N. Y., shipped in good order, etc., a quantity of wheat (about 5,730 bushels), on board of said ship, which was employed by the owners as common carriers, between St. Joseph and Buffalo aforesaid, and in consideration that the plaintiffs promised to pay twelve and a half cents per bushel for transportation, the owners of said ship received the wheat on board, and agreed to proceed directly to Buffalo and deliver the said wheat in like good order, etc. (dangers of the lakes and rivers excepted). That under said agreement the vessel left St. Joseph with the wheat on board, but the owners did not, by themselves or the master (although not prevented, etc.), take care of, and securely carry and deliver it, but on the contrary the vessel was so carelessly managed, etc., that the wheat was lost, and not delivered.

The second count sets forth the agreement to carry, the

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Owners of the Ship Milwaukee v. Hale.

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shipment, etc., and a further agreement to pursue the ordinary and accustomed route to Buffalo, for a vessel of like burden and freight, without voluntary or unnecessary duration, etc., and to deliver in like good order, etc. That the vessel left the port under said agreement, etc., but the master (although not prevented, etc.) did not proceed to Buffalo according to such direct and ordinary route and deliver the wheat, etc., but sailed across lake Michigan, far out of the accustomed course, etc., and, while so deviating, was, on the western shore of the lake, near Southport, Illinois, assailed by a great storm, and wrecked, etc., whereby the wheat was wet, damaged and spoiled, and wholly lost, etc.

The third count corresponds in substance with the first, and the fourth with the second.

The defendant put in two pleas to the whole complaint, one of *non assumpit*, and the other *not guilty*.

It appears further from the record that on May 12th, 1842, a jury was called, and, there not being a sufficient number of jurors in court, the sheriff, by order of the court, summoned talesmen, "who, together with the jurors aforesaid, and *duly elected, tried and sworn*, hear part of the evidence," etc., and the cause is continued until the next day, and thereafter from day to day until May 17th; "at which day, before the judges of the Circuit Court aforesaid, at the court-house in the city of Detroit, come the parties by their attorneys aforesaid, and the *jurors aforesaid*, being called, *answer to their names respectively*, and say that the defendant did undertake and promise in manner and form as the said plaintiffs have alleged in their declaration, and they assess the said plaintiff's damages at the sum of five thousand and forty-nine dollars and fifty-six cents. Therefore, it is considered," etc.

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Owners of the Ship *Milwaukie v. Hale.*

The errors assigned to this record appear in the opinion of the court.

*A. D. Fraser and George C. Bates*, for plaintiffs in error.

*A. & H. H. Emmons*, for defendants in error.

RANSOM, C. J., delivered the opinion of the court.

The counsel for the plaintiffs in error assumes the ground that the *complaint* is in effect a *declaration*, and subject to the same rules of pleading, as well in matters of form as of substance. The defendants, on the other hand, contend that it is not to be considered as a technical declaration, nor to be judged by the strict rules of pleading ; that it is *in lieu* of a declaration, and therefore, though it may contain causes of action which could not be joined in a declaration at common law, the misjoinder cannot be objected to in this form of proceeding.

The first section of the act under which this suit is instituted, provides, that every boat or vessel used in navigating the waters of this state, shall be liable for all debts contracted by the master, etc., for supplies and materials furnished for work and labor done, for wharfage and anchorage, for all injuries done to persons or property by said vessel, and "for all demands or damages accruing from the non-performance of any contract of affreightment, or of any other contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of the boat or vessel, on which such contract is to be performed."

The second and third sections authorize suits to be commenced, in such cases, against the boat by name, by filing a complaint in the office of the clerk of the Circuit Court.

The fourth section provides that the complaint shall set forth the particulars of the plaintiff's demand, and on whose account the same accrued ; that it shall be verified

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Owners of the Ship Milwaukee v. Hale.

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by the affidavit of the plaintiff, or of some other credible person or persons for him, *and shall stand in lieu of a declaration.*

Under this statute the complaint should set forth all the facts necessary to bring a case within the act; that the boat or vessel against which the proceeding is had, is used in navigating the waters of this state; that the complainant has a claim or demand against such boat or vessel which has accrued in one or more of the modes specified in the first section; and (that the proceedings may conform, as near as may be, to those in a suit commenced by summons) the plaintiff, in setting forth the particulars of his demand, should make every *substantial* averment which would be necessary in declaring upon the same cause of action. And the rules with regard to the joinder or misjoinder of counts, apply to such complaints with the same force and propriety, it seems to me, as to common law declarations.

Why should a plaintiff in such proceeding be permitted to join a cause of action arising from a breach of a contract of affreightment, with another arising from a tortious injury to his person or property, any more than he should be allowed to count upon a promissory note and upon a trespass for an assault and battery, or for carrying away goods, in the same declaration? The settled rules of pleading would be alike violated in either case—the same incongruity would exist in the record. The defendant would be met by the same embarrassments in pleading and making his defense, in the one case as in the other. We think the policy of adhering to the settled forms of action and of pleading, is a sound one.

But it is insisted by counsel, that the statute has prescribed a new rule, in this special proceeding. We think not. The mischief of the *old* law was, that the owners of vessels navigating the waters of this state, were fre-

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Owners of the Ship Milwaukee v. Hale.

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quently unknown to our citizens, with whom, through their agents, debts were contracted; or, if known, they resided without the jurisdiction of our courts. The remedy provided by the *new* law, is, an attachment or seizure of the vessel itself, instead of a summons of the owner.

The language of the act itself, if all its provisions be considered, it seems to me, is perfectly conclusive upon this point. The sixth section enacts, that, upon the return of such attachment, "proceedings shall thereupon be had in the Circuit Court against the boat or vessel sued, *in the same manner*, as near as may be, as if suit had been instituted by summons against the person on whose account the demand accrued." And by the following section it is provided that the master, owner, etc., of the vessel, may appear in its behalf, "and *plead to the action*, and defend the same."

If, then, we apply the general rules governing declarations to the complaint of the defendants in error, is it found sufficient?

The plaintiffs contend that it is defective. It contains four counts; two of which, the first and third, are admitted to be in *assumpsit*, setting up a contract, and averring a breach of it. But the plaintiffs insist, that the second and fourth counts charge them with a willful and tortious neglect of a common law duty, as common carriers, and are, therefore, improperly joined with the others. We will first determine the character of the several counts; because, if they shall all be found to belong to the same class, and therefore to be well joined, it will be unnecessary to consider the effect of a misjoinder.

The first count is upon an agreement to carry wheat *directly* from St. Joseph to Buffalo. The breach assigned is, that the plaintiffs did not deliver the wheat, and that it was lost through their mismanagement and carelessness, etc.

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Owners of the Ship Milwaukee v. Hale.

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The second alleges that, in consideration that the defendants had shipped wheat in the plaintiffs' vessel, and had agreed to pay freight, at the rate of one shilling per bushel, the plaintiffs received the wheat on board their vessel, and faithfully *promised* and *agreed*, to pursue the ordinary and accustomed route from St. Joseph to Buffalo, and deliver the wheat at the latter place in good order. The breach is, that the vessel deviated from such route, and that the wheat was *wet, damaged and spoiled*, and not delivered to the defendants, at Buffalo, by the plaintiffs, according to their agreement.

The third count is substantially like the first, and the fourth like the second.

All the counts in this complaint, as well the second and fourth, as the first and third, are most clearly in *assumpit*. They, each and all, set forth a *contract* between the parties, and a breach of that contract. The deviation, violation of duty, etc., are only the circumstances showing how the breach occurred. If those circumstances were omitted, the remaining part would constitute a good declaration in *assumpit*.

I deem this point so clear, upon authority, that I shall not take time to review the cases, but will simply refer to them: *Powell v. Layton*, 5 *B. & P.*, 364; *Boson v. Sandford*, 2 *Show.*, 478; *Dale v. Hall*, 1 *Wils.*, 281; *Burnett v. Lynch*, 12 *E. C. L. R.*, 327; *Gould Pl.*, ch. 3, § 19; 1 *Chitty's Pl.*, 329-30; *Bank of Orange v. Brown*, 3 *Wend.*, 158; *Buddle v. Wilson*, 6 *T. R.*, 369; *Samuel v. Judin*, 6 *East*, 333.

There is, then, no misjoinder of counts in the complaint.

Another error relied upon, and the only one formally assigned, and the one most discussed on the argument, was, that there appeared upon the record two pleas to the complaint, and two distinct issues, and that by the verdict but *one* of the issues was passed upon by the jury.

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Owners of the Ship *Milwaukee v. Hale.*

Either of the pleas in this case is a full answer to the whole declaration, and whether it be *assumpsit* or case, either plea would be good after verdict. As all the counts are conceived to be upon contract, and the plea of *non assumpsit* meets the whole declaration, the plea of not guilty may be treated as a mere nullity—a superfluity upon the record. And, if necessary, for the sake of congruity in the record, that plea may be stricken off, even now.

Another objection urged by the plaintiffs to this record, is that the swearing of the jury is not well set forth. The entry in the record is, that they were "duly elected, tried and sworn." It is insisted that it ought to appear that they were sworn "well and truly to try the issue," etc., joined between the parties.

It is also objected that it is not alleged in the record, that the *talesmen* called and sworn upon the jury had the qualifications of jurors.

To the first of these objections it may be answered that it, in fact, goes only to the form of the clerk's entry, and under our statute may be amended, if need be, after error brought, in affirmance of the judgment: *R. S.*, 461-2.

As to the objection that the *talesmen* are not alleged to have had the requisite qualifications, it is sufficient to say that we will presume after verdict, no challenge having been taken upon that ground, that none but qualified persons were called and sworn.

It may be well said, too, that both these objections—the want of qualifications in the *talesmen*, if there had been any in fact, and the irregular oath administered to the jury, if in truth it was irregular—were waived by the party's going to trial on the merits; and so are the cases. *Evans v. Lee*, 11 *Pet.*, 85, is precisely to that effect. In that case several irregularities were alleged to have intervened during the progress of the trial, and among others, that the

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Owners of the Ship Milwaukee v. Hale.

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verdict had been returned by *eleven* instead of *twelve* jurors. The court say, "These irregularities—whatever might have been their original imperfections, if not waived—were in our opinion waived, by the defendant's going to trial on the merits, and cannot now constitute any objection, upon the present writ of error."

If a party sitting by and seeing less than the requisite number of jurors sworn to try an issue, without objection, shall be deemed thereby to have waived the irregularity, shall he not, with greater reason, be supposed to have done so, if he hear an informal oath administered to the jury without objection, or see an unqualified juror called and sworn without challenge? Unquestionably he shall. Reason and common sense can furnish no other answer to the inquiry.

The fifth objection taken, is, that the jury, after being sworn, heard *part* of the evidence, and then were adjourned from time to time, for several days, before the trial was concluded. This is no ground of error. It is well argued by the defendants, that the facts stated as the foundation of this error are not properly before us, and that we ought not to consider them. They are, in truth, the mere journal entries of the clerk, made in the progress of the business of the court, and have no place in a judgment record. Adjournments of the court from day to day, during the same term, are not continuances that must be stated in the record. But, even if they are considered part of the record in this case, they are no ground for reversal of the judgment. It was a mere matter of discretion with the court, at what times they would sit and adjourn; and that the trial occupied the court and jury from the twelfth to the seventeenth of the month, in no way affects the validity of the judgment.

The last objection raised in the case, is, that it does not appear from the record that the jury were, at any time,

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Howard v. Rockwell.

under the charge of a sworn officer, when they retired to consult of their verdict.

It does not appear that they retired at all. The presumption is that they found their verdict without leaving the bar of the court, in which case no officer was necessary.

Upon an inspection of the whole record, we find no error therein, and the judgment of the court below is therefore affirmed.

*Judgment affirmed.*

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#### Howard v. Rockwell.

Debt on a judgment rendered before a justice of the peace. The plaintiff having proved the judgment by the docket of the justice, the defendant gave in evidence an entry on the same docket, showing that the cause was, on a day named, removed to the Supreme Court by *certiorari*. To rebut which, the plaintiff proved an order of the Supreme Court, made about the same time, dismissing from the docket of that court, a cause having the same title. *Held*, that, *prima facie*, the order was in the same cause in which the judgment of the justice was rendered.

*Held*, also, that the order was a decision of the Supreme Court, that the cause had not been, in fact, removed from the justice into that court, and that the judgment of the justice was in full force.

Error to Oakland Circuit Court. Debt on a judgment rendered before a justice of the peace. Rockwell was plaintiff and Howard defendant in the court below. On the trial, Rockwell, having proved the judgment by the docket of the justice, Howard gave in evidence, from the same docket, an entry of the justice that the cause had been removed to the Supreme Court by writ of *certiorari*, which had been served upon him, and his fees paid for making the return, and also that the execution

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Howard v. Rockwell.

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issued upon the judgment had thereupon been recalled. To rebut this evidence, Rockwell offered in evidence a certified copy of an order of the Supreme Court dismissing from the docket of that court, a cause having the same title with that in which the judgment of the justice was rendered; which order appeared to have been made, about the time when, by the entry on the justice's docket, the *certiorari* was returned. On the part of Howard it was objected that this evidence was inadmissible: 1. Because there was no evidence that the order was in the same cause removed from the justice's court by the *certiorari*; and, 2. Because, after the *certiorari* was returned, the Supreme Court possessed the cause, and the judgment of the justice was vacated, the only remedy of Rockwell being in that court, or on the bond given on the issuing of the *certiorari*. The court overruled the objection, and, the evidence being admitted, charged the jury that, *prima facie*, the order of the Supreme Court was in the same cause certified on the justice's docket to have been removed to that court by *certiorari*, and, unless the contrary was shown, their verdict must be for Rockwell.

Howard excepted to the decision of the court admitting the evidence, and to the charge to the jury; and, a verdict having been found against him, and judgment rendered thereupon, brought the cause into this court by writ of error and bill of exceptions.

*Wm. Draper*, for the plaintiff in error.

*Geo. W. Wisner*, for the defendant in error.

*Felch*, J., delivered the opinion of the court.

The entry in the justice's docket in reference to the *certiorari*, could, at most, be only evidence of his proceedings in the cause entered on his docket, on the service of a writ of *certiorari* upon him. It would only show

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Howard v. Rockwell.

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the service upon him of a paper purporting to be such writ, the making of his return upon it, on the payment of his fees therefor, and the recall of the execution. As to the regularity of the proceedings to obtain such *certiorari*, or any defect in the proceedings, going to the question of jurisdiction of the court, these were matters of which the justice had no knowledge, which he could not decide, and upon which his minutes could be no proof. These were to be decided upon by the court to which the *certiorari* was returnable. It was competent for the defendant in error, to meet the proof made by the entry of the service of the writ removing the cause to the Supreme Court, by showing the proceedings in the cause in that court. The certified copy from the journal of the Supreme Court, which was admitted in evidence, purported to be proceedings in a cause entered upon the docket between the same parties, their names standing in the same relative position, in the same court, and about the same time, as that shown on the justice's minutes. This was sufficient *prima facie* evidence that it was the same cause. The testimony was, therefore, properly admitted.

It is also contended by the plaintiff in error, that the Supreme Court actually possessed the cause, and that the judgment before the justice was vacated—the remedy of the party being in the Supreme Court, or on the bond given by the person obtaining the *certiorari*. This leads us to an inquiry as to the legal effect of the order entered in the case. When the parties and subject matter are properly before the court, the jurisdiction being complete, the court proceed to adjudicate upon the merits of the cause. In that event, we are to expect a final disposition of the cause in the court above. In such case, however, no court would enter an order to strike the cause from the docket. Such an order necessarily implies that the court do not adjudicate on the merits of the controversy between

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Howard v. Rockwell.

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the parties. It conveys to the mind the idea, that, although such a case is entered on the docket, yet it is improperly there, and that no adjudication can be made in the matter on the merits, and therefore it should not cumber the calendar. When, from any defect in the proceedings, or for other cause, there is no jurisdiction in the case, such an order may be proper. Such an order must be considered as a determination of the Supreme Court, that the cause was never, in fact, removed from the justice into that court. And, if not so removed, the judgment before the justice still continued in full force, and might well be the foundation of an action of debt. The effect of this testimony was, therefore, to rebut the presumption arising from the testimony of the removal of the case by *certiorari* to the Supreme Court, by showing that the latter court never acquired or exercised jurisdiction over the matter. The judgment below remained in the same condition as when the *certiorari* was obtained. The court below, therefore, correctly charged the jury, as to the effect of the testimony given in the case.

GOODWIN, J., did not participate in the decision of this cause.

*Judgment affirmed.*

People v. Judges of the Branch Circuit Court.**The People ex rel. Bradley v. The Judges of Branch Circuit Court.**

The writ of *mandamus* is issued only in cases where there is a clear legal right, and the party has no other remedy. (a)

Where the defendant, in a suit commenced in the Circuit Court by writ of attachment under the statute (R. S., 506), moved that court to quash the writ, etc., because the affidavit upon which it was founded was not made before an officer authorized to take affidavits, and the court thereupon permitted the plaintiff to file a new affidavit in the place of the one originally filed, and then refused to grant the defendant's motion, this court refused to grant a *mandamus* to compel the Circuit Court to quash the attachment, etc., but held that the proper remedy in such a case was by *certiorari*. (b)

The proceedings by attachment, being under a special statute, and out of the course of the common law, the original affidavit, and the new one permitted to be filed, with the adjudication of the court directing it, would, in such a case, go upon the record, and be removed to this court by writ of *certiorari*. (b)

**Motion for a *mandamus*.** On the 5th day of October, 1838, an affidavit for an attachment, under the statute, (R. S., 506), was made before the clerk of the Circuit Court for the county of Branch, and an attachment issued, at the suit of Abiathar Culver, against Samuel R. Bradley, the relator, by virtue of which certain real estate of the relator was levied upon. The case proceeded to judgment March 18, 1840, when an order for the sale of the property attached was made, by virtue of which it was sold to Culver on the 13th day of July, 1840. Upon an affidavit of these facts, on the 16th of June, 1842, an order was made for a stay of proceedings, and prohibiting the sheriff from executing the deed; which order was served upon Culver, together with a notice of a motion to quash the attachment, and to set aside the proceedings had thereon. This motion having been submitted, leave was granted by the court to file a new affidavit in place of that originally filed as the foundation of the writ, and

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(a) In *Lagrange v. State Treasurer*, 24 Mich., 469, 476, the earlier cases on this point are reviewed and the true doctrine held to be that *mandamus* will lie for enforcing a specific legal right for which there is no other adequate legal remedy.

(b) See *Wiley v. Allegan Circuit Judge*, 29 Mich., 487, 492; 27 Mich., 304.

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People v. Judges of the Branch Circuit Court.

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also for the sheriff to amend his return, and upon such affidavit being filed, and the return amended, the motion to quash was denied. Whereupon the relator now moved this court for a *mandamus*, commanding the Circuit Court for the county of Branch, to quash the attachment, and to set aside all of the proceedings in the cause.

*J. S. Chipman*, in support of the motion.

*Fuller, contra.*

*Goodwin, J.*, delivered the opinion of the court.

The grounds of the application are, that the original affidavit was a nullity, the clerk not having at the time any authority to take it; and that it was not competent for the Circuit Court to permit the new one to be filed, so as to save the proceedings.

If the grounds alleged are tenable, is the writ of *mandamus* the proper remedy?

It is a writ not resorted to, or issued, where the party has another remedy, but only in cases where there is a clear right, and no other remedy. Then it is, that this extraordinary writ is resorted to, for the advancement of justice.

Is there no other remedy for the supposed errors in this case? It seems to me that there is; that the original affidavit, as well as the new one permitted to be filed, with the adjudication of the court directing it, would go upon the record—the proceedings by attachment being special statutory proceedings, not according to the course of the common law—and that the writ of *certiorari* would remove them to this court. True, it would not bring here the various affidavits, on which the motion was made and resisted, aside from those above mentioned, which would go upon the record. But they are immaterial, as the question is one going to the authority of the court in the

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Thompson v. Bowers.

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premises; and all material to this would necessarily appear. As the proceeding is a special statutory proceeding, and the affidavit in the first instance is the foundation of it, this, of course, must appear in the record; and as the new affidavit was permitted to be filed under the statute, to sustain the proceedings, on the ground that the original, which preceded the writ, was defective, this must also, therefore, go upon the record, with the adjudication of the court so directing. These are not mere matters of practice in the court below, but proceedings based on the special provisions of the statutes, under which these proceedings were had; and the writ of *certiorari* is the appropriate writ, whereby they would be removed to this court.

We are therefore of opinion that, the applicant having another remedy, in the usual course of proceeding, this motion should be denied.

*Motion denied.*

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#### Thompson v. Bowers.

A notice of special matters to be given in evidence must contain all the substantial requisites necessary to constitute a special plea which would be good on general demurrer. (a)

To a declaration in slander, alleging that the defendant charged the plaintiff with having sworn falsely, the defendant pleaded the general issue, and gave notice that he would prove on the trial "that the plaintiff was guilty of the facts charged upon and imputed to him by the defendant, in the several conversations in the declaration mentioned, and that, if the words were uttered and published as charged in the declaration, the defendant had good reason for uttering and publishing, and did it from good motives and for justifiable ends." Held, that this notice was fatally defective; especially in omitting any averment that the plaintiff *willyfully and deliberately* swore falsely; and that the defendant could not, upon the trial, introduce any evidence under it.

In an action for slander, evidence of the truth, or tending to prove the truth of the slanderous words, is inadmissible under the general issue in mitigation of damages. (b)

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(a) Since the revision of 1846 such notice is sufficient if it briefly state the precise nature of the matter of defense: *Cresinger v. Reed*, 25 Mich., 451.

(b) Overruled: *Hudson v. Dale*, 19 Mich., 17.

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Thompson v. Bowers.

So, also, evidence that the specific facts in which the slander consisted, were communicated to the defendant by third persons. (c)

In an action for slander, the plaintiff, after having proved the words alleged, may give in evidence other slanderous words of like import, with a view to show the malice of the defendant. (d)

Error to Oakland Circuit Court. This was an action on the case for slander. Bowers was the plaintiff, and Thompson the defendant in the court below. The declaration alleged that Thompson uttered and published that Bowers swore falsely in giving his testimony on the trial of a cause between Thompson and one Ellis, at the May term, 1838, of the Oakland Circuit Court. Thompson pleaded the general issue, and also gave notice that he would give in evidence in defense, on the trial of the cause, "that at and before the time of the uttering and publishing as complained of in said plaintiff's declaration, the said plaintiff had been and was guilty of the facts charged upon and imputed to him by the said defendant, in the said several conversations in the said plaintiff's declaration mentioned; and that if the words were uttered and published, as charged in the said plaintiff's declaration, the defendant had good reason for uttering and publishing, and did it from good motives, and for justifiable ends."

On the trial of the cause before the Hon. Chas. W. WHIPPLE, presiding judge, at the September term, 1842, Bowers having proved the words charged in the declaration, Thompson offered to prove the truth of the words spoken; to which the counsel for the plaintiff below objected, on the ground that the notice was insufficient; that the facts therein alleged were not set forth with sufficient certainty; and that it should have averred, not only that the defendant swore falsely, but that he did so

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(c) Overruled: *Farr v. Rasco*, 9 Mich., 333; *Hudson v. Dale*, 19 Mich., 17, 27.

(d) See *Whittemore v. Weiss*, 33 Mich., 348; *Scripps v. Reilly*, 35 Mich., 371; *Taylor v. Kneeland*, *ante*, p. 67.

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Thompson v. Bowers

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willfully and corruptly. The court sustained the objection, and rejected the evidence.

Thompson also offered to prove that the testimony of Bowers, on the trial of the cause mentioned in the declaration, was false; and further, that at and before the time of uttering and publishing the slanderous words alleged, he had been informed by Peter Lambert and others of his neighbors, of certain facts which might have tended to induce the belief in his mind that Bowers had sworn falsely. This evidence was also objected to by the plaintiff below and rejected by the court.

Bowers then offered to prove by one Ellis, that in the spring of 1838, Thompson said to the witness that "Bowers swore false down at Barrett's"—words not alleged in the declaration to have been uttered and published. This evidence was objected to by the defendant below, but the court overruled the objection and admitted the evidence.

To these several decisions of the court admitting or rejecting evidence, the counsel for the defendant below excepted, and, a verdict having been found for the plaintiff below, tendered a bill of exceptions, and removed the cause to this court by writ of error.

*O. D. Richardson*, for the plaintiff in error.

*Draper & Wisner*, for the defendants in error.

*Ransom*, J., delivered the opinion of the court.

We have no doubt that the testimony sought to be introduced under the notice, was properly rejected. The notice is clearly defective. Although, in a notice of special matter, appended to a plea of the general issue, technical formality may be dispensed with, still, all substantial facts necessary to constitute a good special plea must be averred.

The statute (*S. L. of 1839*, p. 225) authorizes a defend-

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Thompson v. Bowers.

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ant to plead the general issue, and give notice with such plea of any matters which, if pleaded, would be a bar to the action, and give such matters in evidence on the trial, in the same manner as if the same had been pleaded. It has been often held, that the true way to test the sufficiency of a notice is, to inquire whether the matters in it, if pleaded, would be good on a general demurrer. In *Shepard v. Merrill*, 13 J. R., 475, Justice Spencer says, "a notice need not partake of the form and strict technicality of a special plea, but it must contain the *substance* of a plea." In *Mitchell v. Borden*, 8 Wend., 572, this precise question was before the court. The notice in that case was more full and formal than the one we are now considering, but was held to be bad; and the court, in deciding the case, say: "If the matter contained in the notice had been put in the form of a plea, it would, most obviously, have been bad on general demurrer; it simply alleges that the facts sworn to by the plaintiff below were not true, but contains no allegation or intimation that such falsehood was willful or corrupt; for aught that it disclosed or averred in the notice, it may have been an unintentional and innocent mistake on the part of the plaintiff." If these cases are correctly decided (and of this we have no doubt), they clearly establish that the notice in this case is insufficient. It can scarcely be said to contain any substantial requisite of a good special plea; and it is especially defective in the very particular in which the notice was adjudged ill in *Mitchell v. Borden*. This notice contains no averment that the plaintiff below swore falsely, willfully and corruptly.

2. The testimony adduced by the plaintiff under the general issue, and rejected by the court below, was offered for the avowed purpose of rebutting any presumption of malice that might have been raised by the defendant at the trial, and thus mitigating the damages. It was

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Thompson v. Bowers

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objected to by the defendant, on the ground that it tended to prove a justification.

It seems to have been formerly holden, that such evidence was admissible under the general issue. A contrary rule, however, has long prevailed. In *Starkie on Slander*, 241, it is said: "The rule of law upon this head has long been settled, that the defendant, if he mean to rely on the truth of that which he has published, either in bar of the action, or in *mitigation of damages*, must plead it specially." *Underwood v. Parks*, 2 Strange, 1200, is the leading English case upon this question. There, in an action for words, the defendant pleaded not guilty, and offered to prove the words to be true, in mitigation of damages; but the judge refused to permit it, saying, that at a meeting of all the judges, in a case that arose in the common pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words; that this was now a general rule among them all, from which no judge would think himself at liberty to depart, and that it extended to all sorts of words, and not barely to such as imported a charge of felony. The rule established in this case seems to have since predominated, both in England and this country, and to have settled beyond controversy, that the *truth* of the words spoken cannot be given in evidence under the general issue, either in justification, or in mitigation of damages. But what facts and circumstances may be given in evidence under such plea, has been by no means, so clearly determined. The English courts, in cases where no justification is pleaded, appear to have held, that, in actions for words, the defendant might, in mitigation of damages, give any evidence short of such as would be a complete defense to the action had a justification been pleaded: *Starkie on Slander*, 406.

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Thompson v. Bowers.

But they manifestly confine the rule to cases where no attempt is made to justify: *Snowden v. Smith*, 1 *M. & S.*, 286; *Leicester v. Walter*, 2 *Campb.*, 251. In *Shepard v. Merrill*, before cited, Justice Spencer holds this language: "No principle is better established, than that the truth of slanderous words cannot be given in evidence under the general issue, either as a defense, or in mitigation of damages." *Matson v. Buck*, 5 *Cow.*, 499, was an action for charging the plaintiff, who was superintendent and collector of the Erie canal, with peculation from the state. The plea was the general issue, with notice of justification. Failing to make out this on the trial, the defendant proposed to show that the plaintiff's general reputation was bad, and that it was generally reported and believed in the neighborhood that he had, in several instances, defrauded the state. This evidence, being objected to, was rejected by the Circuit Judge, and a motion for a new trial, founded upon this ruling, was denied by the Supreme Court. In the case of *Root v. King*, 7 *Cow.*, 613, this question is elaborately considered, and the leading cases bearing upon it carefully reviewed. Chief Justice Savage, reiterating the doctrine declared in *Matson v. Buck*, says that the defendant in such actions, if he has not attempted to justify the charge, may prove under the general issue, by way of excuse, anything short of a justification, which does not necessarily imply the truth of the charge, or tend to prove it true, but which repels the presumption of malice. In *Warner v. Price*, 3 *Wend.*, 397, Justice Marcy re-affirms the principle of the last case, and adds, that particular facts, which might form links in the chain of circumstantial evidence against the plaintiff, cannot be received under the general issue, in mitigation of damages. *Starkie on Slander*, 410, is to the same effect. Again, in *Mapes v. Weeks*, 4 *Wend.*, 662, Chief Justice Savage remarks, that where a defendant in slander

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Thompson v. Bowers.

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does not pretend to justify, he may mitigate the damages in two ways: 1. He may show that the plaintiff's general character is bad; 2. He may show circumstances which tend to disprove malice, but do not tend to prove the truth of the charge. In *Gilman v. Lowell*, 8 Wend., 573, the same judge again thoroughly sifts the doctrine upon this subject, and in concluding his opinion, says: "The more I have considered this subject, the more am I convinced that the Supreme Court of Massachusetts and this court have proceeded upon the only correct rule, in excluding under the general issue all mitigating circumstances, which have a tendency to prove, what cannot be proved under such a plea, the truth of the words. *Purple v. Horton*, 13 Wend., 25; *Wolcott v. Hall*, 6 Mass., 518; *Alderman v. French*, 1 Pick., 1; *Bodwell v. Swan*, 3 Pick., 377, and *Bailey v. Hyde*, 3 Conn., 463, are strong cases to the same point.

That the evidence offered by the plaintiff in mitigation, to show that the specific facts, in which the slander consisted, had been communicated to him by other persons, was correctly excluded, is most satisfactorily shown by *Mills v. Spencer*, Holt's N. P. Cases, 533; *Lewis v. Niles*, 1 Root, 346; 2 Stark. Ev., 469; *Jackson v. Stetson*, 15 Mass., 57.

Although the general rule deducible from these and other kindred cases, has been recognized and admitted, yet it has been much modified in its application to individual cases. And, although, as before stated, courts have differed in opinion as to what facts and circumstances may be given in evidence to mitigate the damages, the truth of the charge, or facts which tend to prove its truth, or particular instances of criminality, are inadmissible for that purpose.

Under the application of this rule, the testimony offered

*Thompson v. Bowers.*

by the plaintiff, on the trial, was clearly incompetent, and therefore correctly rejected by the Circuit Court.

3. Again, it is insisted that the court below erred in permitting the defendant, Bowers, to prove that the plaintiff said of him that he had sworn falsely down at Barrett's; there being no such charge in the declaration.

The decisions on this point, too, have been somewhat variant and contradictory. In *Bodwell v. Swan*, 3 Pick., 378, Parker, C. J., says, "it is a difficult question." In *Mead v. Daubigny*, *Peake's Cases*, 125, the declaration stated conversations with one particular person, and evidence was offered of words spoken to another person. Lord Kenyon admitted the evidence to show the state of the defendant's mind, and malice towards the plaintiff, saying, "in actions for words, he had always understood the plaintiff might give evidence of any words used by the defendant, to show the spirit and temper by which he was actuated;" but added that he was clearly of opinion that evidence of words actionable in themselves was not admissible. In the case of *Lee v. Huson*, tried in the year following, the same judge decided, on similar evidence being offered, that, in actions for words, it was the practice to admit the evidence of other words besides those charged in the declaration, though they contained matter which was ground of another action. Lord Ellenborough held, that any words might be given in evidence, as well as any act of the defendant, to show *quo animo* he spoke the words which are the subject of the action: 1 *Camp.*, 49. In *Wallace v. Mease*, 3 *Binn.*, 550, this question was very fully discussed, and Chief Justice Tilghman expressed strong doubts of the propriety of such evidence, but said he must assume it as a principle that subsequent words may be given in evidence; and that he could see no reason for a distinction between words actionable and not actionable, or between words spoken before suit brought,

*Thompson v. Bowers.*

and words spoken after. The case of *Kean v. McLaughlin*, 2 *Serg. & R.*, 470, fully sustains the doctrine of *Wallace v. Mease*. *Duvall v. Griffith*, 2 *Har. & Gill.*, 30, is also a strong case upon this point. The plaintiff, among other slanders declared for, charged the defendant with speaking of the plaintiff the following words: "He is a sheep stealer," "he stole Plummer's sheep," and that he "could prove he stole Plummer's and P. D. Ridgeley's sheep." The plea was *not guilty*. At the trial, the plaintiff proved the words laid in the declaration, and also offered to prove that the defendant had said, *prior* to bringing the suit, that the plaintiff had stolen two of P. D. Ridgeley's fat lambs. The defendant objected to the evidence so offered, but the court were of opinion that it was competent evidence, and permitted it to go to the jury. The defendant excepted. On argument of the case in the Court of Appeals, the decision of the court below was affirmed. Buchanan, C. J., in delivering the opinion, decided that the testimony objected to by the defendant was admissible for the purpose of showing the malice of the defendant, in speaking the words laid in the declaration.

The principle to be extracted from the current of the cases, seems to be, that in an action for slander, the plaintiff, after having proved the words alleged in the declaration, may give in evidence the uttering by the defendant of other slanderous words, of similar import to those charged, with a view to show the malice of the defendant. The decision of the court below falls within the principle stated, and was not, therefore, erroneous.

Upon the whole, we are of opinion that there is no error in the record and proceedings of the Circuit Court, and the judgment must, therefore, be affirmed with damages and costs.

GOODWIN, J., did not participate in the decision.

*Judgment affirmed.*

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Galloway v. Holmes.

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## Galloway et al. v. Holmes.

If goods be sold on a credit, the vendor cannot, before the credit has expired, maintain *assumpsit* for goods sold, even though he can prove that the vendee induced him to sell the goods by fraudulent representations. (a)

Fraud does not render a contract void, but merely *voidable*, at the option of the defrauded party. (b)

If the defrauded party elect to affirm the contract, he is bound by it in all respects. (c)

If a vendor, having a right to rescind a contract of sale of goods, on account of the fraud of the vendee in making the purchase, brings *indebitatus assumpsit* to recover the price of the goods, he thereby affirms the contract.

Where there is an *express* contract, none can be *implied*.

Where the defrauded party rescinds an *express* contract, he cannot set up an *implied* one and sue the other party thereon.

Payment, by the defendant to the plaintiff, pending an action of *assumpsit*, of part of the entire demand to recover which the action is brought, is not equivalent, in its effect as an admission of the cause of action, to a payment of money into court.

A law of New York, which would enable a vendor, of whom goods had been purchased fraudulently on a credit, to maintain *assumpsit* against the vendee for the price of the goods, before the credit had expired, would be a law affecting the remedy only, and would not apply so as to enable the vendor to maintain a similar action in this state, to recover the price of goods sold in New York.

But, held, on a review of the cases, that such was not the law of New York.

In a suit commenced by writ of attachment under the statute (R. S., 506), the plaintiff in the writ cannot declare for a cause of action which did not accrue until after the writ was issued. (d)

Case certified from Wayne Circuit Court. This suit was commenced by attachment against the defendant as a non-resident debtor, under the provisions of the statute, R. S., 506. The attachment was issued on the 15th day of June, 1839. The declaration was in *indebitatus assumpsit* for goods sold and delivered. Plea, the general issue.

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(a, b, c) See Jewitt v. Petit, 4 Mich., 508; Dunks v. Fuller, 22 Mich., 242.

(d) See Hale v. Chandler, 3 Mich., 531; Buckley v. Lowry, 2 Mich., 418; Cross v. McMaken, 17 Mich., 511.

*Galloway v. Holmes.*

On the trial of the cause at the May term, 1842, it appeared from the deposition of one Lewis W. Clark, that he, as the agent of the defendant, on or about the 9th day of May, 1839, purchased of the plaintiffs, in the city of New York, a bill of goods to the amount of \$1,931.50. In payment for these goods, a bill of exchange was given, as set forth in the receipt annexed to the bill of goods, and which was read in evidence as follows :

“ NEW YORK, 9th May, 1839.

“ *Mr. L. W. Holmes,*

“ Bought of Galloway & McFarlan, 209 bars Swedes Iron and other items amounting in all to \$1,931.50. Received his draft, May 9th, at 6 mos., accepted by Sylvanus Holmes, Esq., Utica, N. Y., payable at Mechanics' Bank, New York.

[Signed]

“ **GALLOWAY & MCFARLAN.**”

There was also evidence adduced tending to prove that the plaintiffs were induced to sell the goods, and to receive the bill of exchange in payment, by the fraudulent representations of Clark, the agent of the defendant in making the purchase.

It also appeared, that about a year after the commencement of this suit, the defendant paid one half of the demand to the plaintiffs.

The defendant insisted, on the trial, that the action was premature ; that the goods were sold upon a credit, and that the action was brought before the credit had expired, and therefore could not be sustained.

It was thereupon agreed between the counsel for the respective parties, that the question of fraud should be submitted to the jury who should pass upon it ; and that the point insisted upon by the defendant's counsel should be reserved, and the case certified to this court for its opinion thereon.

Galloway v. Holmes.

The jury found that the defendant was guilty of fraud in the purchase of the goods, and that the purchase was fraudulent, and assessed the plaintiffs' damages at the sum of \$1,131.79.

A statement of the above facts was then drawn up and signed by the counsel and certified to this court by the presiding judge, pursuant to their agreement.

*H. H. Emmons*, for the plaintiffs:

The goods having been fraudulently obtained, the contract was void, and an action might be immediately brought upon an implied *assumpsit* to pay for them: *Manufacturers and Mechanics' Bank v. Gore and another*, 15 Mass., 75; *Young v. Adams*, 6 Mass., 182; *Wilson v. Force*, 6 Johns., 110; *Arnold v. Crane*, 8 Johns., 82; *Pierce v. Drake*, 15 Johns., 475; 2 *Saund. Pl. and Ev.*, 527; 2 *Hall*, 245; 1 *Esp. Cas.*, 430; *Hogan v. Shee*, 3 *Esp. Cas.*, 523; 6 *E. C. L. R.*, 157; *Hill v. Perrott*, 3 *Taun.*, 274; 1 *Starkie N. P. Cas.*, 20; *Stedman v. Gooch*, 1 *Esp.*, 3; *Chitty on Bills*, 196; *Norris v. Aylett*, 2 *Camp.*, 329; *Puckford v. Maxwell*, 6 *T. R.*, 52. It may be said that these are cases where the note of a third person was taken, and that in such cases no credit is given, but that it is otherwise where the vendee gives his own note; there a credit is given. But a credit is implied, by the vendor's receiving paper payable on time, whether of the vendee, or of a third person: 1 *Esp. Cas.*, 4. In *Wilson v. Force*, 6 Johns., 110, this was taken for granted. But in the present case the acceptance of a *third person* was received in payment.

Fraud vitiates all contracts and renders them complete nullities: *Com. on Contr.*, 65, 66; 2 *Kent's Com.*, 482; 2 *Stark. Ev.*, 340; *Cary v. Hotaling*, 1 *Hill*, 313. The contract in this case, being absolutely void, the defendant held the goods tortiously. The plaintiffs had a present

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Galloway v. Holmes.

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right of action either by trover or replevin. The conversion was complete by the fraudulent possession; and whenever a party may bring trespass or trover for goods, he may waive the tort and bring *assumpsit*: 2 *Saund. Pl. and Ev.*, 525; 1 *Chitty's Pl.*, 113; 1 *Saund. Pl. and Ev.*, 111. The bringing *assumpsit* is not an affirmation of the contract: *Biddle v. Levy*, 2 *E. C. L. R.*, 277; 6 *E. C. L. R.*, 157, and *Hill v. Perrott*, 3 *Taun.*, 374, show that if there is a fraudulent special contract, even where the goods are delivered under it, to a third person, the vendor may recover the price of them under the common counts; which could not be the case, if the bringing *assumpsit* was an affirmation of the particular contract.

Whenever a party may rescind a special contract he may maintain *indebitatus assumpsit* upon an implied promise for the labor done, the goods delivered, or the money paid under it: 1 *Chit. Pl.*, 380; *Giles v. Edwards*, 7 *T. R.*, 181; *Linningdale v. Livingston*, 10 *Johns.*, 36; *Gary v. Hull*, 11 *Johns.*, 440; *Raymond v. Bernard*, 12 *Johns.*, 274; 4 *Pick.*, 101; 4 *Cow.*, 556; *Coon v. Greenman*, 7 *Wend.*, 121; 4 *Wend.*, 285; *Ketchum v. Evertson*, 13 *Johns.*, 365; *Clark v. Smith*, 14 *Johns.*, 326; *Mead v. De Gallier*, 16 *Wend.*, 638; *Peltier v. Snell*, 12 *Wend.*, 388. It may be said that in these cases the credit had expired when the action was brought. But no matter; the objection here is that there is no implied contract where there is an express one, and the cases cited show that such is not the law; they also sustain fully the ground that whenever a party has a right to rescind the special contract, he may sue on an implied promise.

The contract in this case was made in New York. The law of that state must therefore govern it. By that law, the whole contract was void, and the plaintiffs had a right to bring their action for the price of the goods immediately after they were delivered to the defendant: 2 *Ken's*

*Galloway v. Holmes.*

*Com.*, 458, and cases there cited; *Story's Confl. Laws*, §§ 242, 262; 1 *Bing: N. C.*, 151; *Story's Confl. Laws*, §§ 314, 361, 316, 318, 212, 278, 272, 270, 276, 266, 354, 355.

But in this case, the bill of exchange received in payment for the goods, matured before the filing of the declaration. The following cases sustain the position that a *capias* may be issued before the maturity of the cause of action: 4 *East.*, 7; 7 *Id.*, 4; 11 *Id.*, 118; 1 *B. & P.*, 343.

The payment by the defendant, since this action was commenced, of part of the demand, is an admission of the contract as laid in the declaration. It is equivalent to a payment of money into court: 2 *East.*, 132; 2 *M. & S.*, 112; 2 *Harr. Dig.*, 1584.

*T. Romeyn*, for the defendant:

1. The action was prematurely brought. The plaintiffs had no right to sue before the credit had expired: 4 *East.*, 152; 3 *Bos. & Pull.*, 584; 2 *Hall*, 347, and cases there cited by counsel.

2. If the plaintiffs elected to consider the sale fraudulent and to sue immediately, the action should have been *trover* or deceit. By suing in *assumpsit* for the price of the goods, they affirmed the contract: *Com. on Contr.*, 210; 9 *B. & C.*, 59; 17 *E. C. L. R.*, 330; 14 *Id.*, 388; 19 *Johns.*, 205; 4 *Paige*, 541; 15 *Mass.*, 156; 4 *Greenl.*, 319; *Chit. on Contr.*, 680, 1, 2, 5. These cases all decide that *assumpsit* will not lie. The following cases show that *trover* will lie: 3 *Johns.*, 233; 10 *Johns.*, 172; 15 *Id.*, 187; 6 *Cow.*, 110; or *replevin*: 15 *Mass.*, 156; 4 *Greenl.*, 319. It is true that some of the New York cases are apparently opposed to this doctrine; but they are distinguishable from the present. In cases where goods are sold, *not upon credit as to time*, but entirely upon the credit given to a particular species of payment, which is turned out as *cash*, then upon a discovery of

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Galloway v. Holmes.

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fraud, the price of the goods may be sued for at once. This is the case of *Wilson v. Force*, in 6 *Johns.*, 110. It is similar to a payment in counterfeit bank-bills. But if the sale is *made upon time*, then time must be allowed, or the sale must be disaffirmed.

It is further respectfully insisted by the defendant, that if the American cases differ from the English, it is the duty of this court to adhere to the latter, as the most reliable exponents of the true doctrines of the common law.

It is no answer to this remark, to say that the contract was made in New York, and that therefore the New York decisions must govern. The present question is merely as to the *form of the remedy*. The plaintiffs insist that they sought a proper remedy by suing for the price of the goods in *assumpsit*. The defendant says that the remedy should have been by an action sounding in tort. In all such cases, the *lex fori*, the law of the place where the action is instituted, should govern: *Story on Conf. Laws*, 277, 468. There is no hardship in the consequences resulting from this rule. The plaintiffs might have stopped the goods in *transitu*, or replevied them; or they might have sued in trover or deceit. But if they saw fit to consider the goods as sold, they were bound to adhere to the terms of the only contract under which they were sold.

RANSOM, C. J., delivered the opinion of the court.

The sole question presented by this case is, whether the action was properly brought, it having been commenced before the credit of six months on which the goods were sold to the defendant, had expired. The plaintiffs contend that, the goods having been obtained from them by the fraudulent representations of the defendant or his agent, the contract of sale on six months' credit was utterly void, and the draft given by the defendant in payment a nullity; that they had a right to treat it as mere

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Galloway v. Holmes.

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waste paper, and bring their action for the price of the goods as though it had never been delivered to them, and as though no express contract touching the sale and purchase of the goods had been shown.

The question involved is one of much practical importance, and has been argued with great zeal and ability by the counsel for both parties. It is one upon which jurists of great learning and experience have differed in opinion; and anxious, in establishing a rule here, to fix upon that one which seemed most strongly fortified by adjudged cases of approved authority, and most in accordance with settled principles, we have given it the most thorough and deliberate consideration which the time at our disposal would allow.

That the original contract between the parties was *utterly null and void*, by reason of the fraud of the defendant, is not, I think, true, to the broad and unqualified extent contended for by the plaintiffs. I understand a contract to be *void*, in a strictly legal sense, only when it can be enforced by none of the parties to it; as, for example, one founded upon a gaming or other illegal consideration. This was a valid and subsisting contract as against the defendant, which the plaintiffs could have enforced, according to its terms and effect, had they elected to do so. It could only be disaffirmed by the plaintiffs, who were the defrauded party. Until they have disaffirmed it, it cannot be said that there was *no contract*, or that the contract was *void*, however fraudulent it might have been on the part of the defendant. It was merely *voidable* at the option of the plaintiffs. I am aware that many of the cases, and of the elementary books, frequently apply the term *void* to the class of contracts to which the one under consideration belongs, but they oftener, perhaps, and certainly with more propriety, employ language which indicates their true character; as, that a party lured into a

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Galloway v. Holmes.

contract by the fraud of another, may *disregard*, may *disaffirm*, may *treat as void* the contract, etc. In *Chitty's* classification of such contracts, he denominates them "contracts *voidable* on the ground of fraud." *Chitty on Contr.*, 678.

If there was an express contract, none can be implied. It is a well settled principle, that promises *in law*, exist only in the absence of *express* promises: *Whiting v. Sullivan*, 7 Mass., 107; *Chitty on Contr.*, 25. In *Toussaint v. Martinant*, 2 T. R., 104, where a surety had taken a bond from his principal, and the principal having failed, he had paid the debt, and then brought *assumpsit* for the money paid, Buller, J., held this language: "Why does the law raise such a promise? Because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties." Again, in *Cutter v. Powell*, 6 T. R., 320, Lord Kenyon said, that, "the rule, that where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law." And Justice Ashurst, in the same case said: "It has been argued that the plaintiff may recover on a *quantum meruit*; but she has no right to desert the agreement; for wherever there is an express contract, the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage."

If, then, as has been shown, the contract for the sale and purchase of the goods was merely voidable at the election of the plaintiffs, and not absolutely void *ab initio*, on account of the fraud of the defendant, this action cannot be sustained; because, there having existed an express contract, the law will not imply one.

The counsel for the plaintiffs admit, that if there was a

Galloway v. Holmes.

valid contract subsisting between the parties when the action was commenced, it must govern, and the action be founded upon it.

There was such a valid and subsisting contract, unless it was disaffirmed by the plaintiffs, on account of the fraud. Do they not affirm it by suing in this form of action? They answer negatively, and say they reject the contract altogether, and content themselves with showing the goods unaccounted for in the hands of the defendant; insisting that from this evidence the law raises an implied promise to pay for them. This is met by the defendant with proof of an express agreement, by the terms of which his liability to pay for the goods had not accrued when the suit was commenced. To this it is replied that the express agreement was fraudulent on the part of the defendant, and that he cannot set it up as a defense to the just claim of the plaintiffs. But it must be remembered that the defendant does not admit the agreement to be fraudulent. He insists that it is a valid contract, and binding upon both parties. The plaintiffs allege the fraud, and rely upon it in avoidance of the contract actually made. That they might have disregarded the agreement and sued immediately on discovering the fraud, is undeniable, but I think it is equally clear, that they should have brought their action for the injury occasioned by such fraud. If the purchase on the part of the defendant was fraudulent, he acquired no title to the goods by the purchase, and the plaintiffs might undoubtedly have brought trover for their conversion, or replevin for their return; but by bringing *assumpsit* they waived the wrong; they alleged a sale and based their right to recover on the sale alone. It was competent for them to do so; but they thereby placed themselves in the exact position they would have occupied had no fraud existed; that is, they might have recovered upon an implied promise had not an express promise

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Galloway v. Holmes.

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been shown. Such an one, however, being proved, they were confined to, and bound by it.

Where the defrauded party rescinds an express contract entered into by him, he cannot set up an implied one, and sue the other party thereon : *Chitty on Contr.*, 680, 681. A contrary doctrine, it seems to me, would be a violation of settled principles upon the subject of contracts and remedies. I will review some of the leading cases bearing upon this question.

The first case referred to by the plaintiffs' counsel was the *Manufacturers and Mechanics' Bank v. Gore & Grafton*, 15 Mass., 75. Grafton applied to the bank to know if a note, drawn by the defendants, who were partners, and indorsed by two other individuals whom he named, would be discounted, and being informed that it would, drew the note, signed it for the firm, and, without the knowledge or consent of the payees, placed their names as indorsers upon the back of it. This note, with two similar ones, all on time, was discounted by the bank, and the proceeds passed to the credit of the defendants. Grafton soon afterwards absconded, and the bank, learning the forgery, brought their action of general *indebitatus assumpsit* for money had and received, money lent, etc., against the defendants, although the credit agreed upon had not expired. Gore, who was entirely innocent of the fraud practiced by Grafton, defended the action upon the ground, among others, that the parties undertook to make a special contract, and the notes given were not payable until after the suit was commenced. But the plaintiffs had judgment, and Parker, C. J., in delivering the opinion of the court, observed that, "upon this point we have no doubt, and we believe the doctrine has been generally received and practiced upon in this commonwealth, that where goods are purchased upon a credit, or money borrowed, and the security agreed upon by the parties,

*Galloway v. Holmes.*

turns out to be of no value, and different from what it was represented to be by the debtor, it may be treated as a nullity; and an action will lie immediately, for the sum it was intended to secure." The counsel for the defendant drew this distinction between that case and the present one; that in this case there was a distinct agreement for credit, independently of the bills given for the goods, while in the case cited, he insists that the notes were given in payment for the money received by the defendants, without any express agreement for time; that the plaintiffs, in other words, purchased the notes and paid the money for them. The distinction taken is an obvious one, and one that is generally recognized in the books. It is not, however, quite so clear that the facts in the case of the *Manufacturers' and Mechanics' Bank v. Gore & Grafton*, are such as to render the distinction applicable; although, it is true, that Parker, C. J., in delivering the opinion of the court, quoted and relied upon *Stedman v. Gooch*, and other kindred cases, where, as we shall hereafter see, the distinction was properly recognized and applied. But another view may be taken of the case of the *Manufacturers and Mechanics' Bank v. Gore & Grafton*, which distinguishes it most clearly from the case now under consideration. The forged indorsements on which the money was obtained from the bank, were absolutely null and void. The plaintiffs never could have recovered upon them; no more after, than before the maturity of the notes. There was, therefore, no express contract between the parties with regard to the payment, and the money having been received by the defendants, the law implied an agreement on their part to repay it immediately.

In *Wilson v. Force*, 6 Johns., 109, the plaintiff sold to the defendant a horse and chaise for \$300, and received in payment a note against a third person, which had some time to run. The defendant represented the maker of

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Galloway v. Holmes.

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the note to be good and responsible, when in fact he, at the time, knew him to be insolvent and worthless. On learning this fraud, the plaintiff offered to return the note, and demanded payment of the defendant for the property, which being refused, he thereupon, before the note received in payment fell due, brought *assumpsit* for the amount due him, and was allowed to recover. In this case no agreement for credit was shown. It was a sale of the goods, and a receipt of the note in payment. The note proving to be no payment, on account of the fraud of the defendant, the case stood as a naked sale of the property, and, there being no express contract between the parties, the law presumed that the defendant promised immediate payment. The court in deciding the case used broad and general language. "If," said they, "the special contract be void on the ground of fraud, the plaintiff may disregard it, and bring *assumpsit* for the goods sold. The taking of the note under a fraudulent misrepresentation was no payment, and any term of credit which the taking of the note may have implied became void." The rule thus stated is unquestionably correct as applied to the facts then before the court, but, in my judgment, it cannot be sustained upon principle, when applied to a contract for the sale of goods made expressly upon a term of credit, irrespective of the security given.

In *Arnold v. Crane*, 8 Johns., 82, the plaintiff loaned to the defendant a sum of money, and took his promissory notes for the amount. By a subsequent arrangement between them, the defendant conveyed to the plaintiff certain real estate as security, in lieu of the notes, which were given up to the defendant. The defendant took the deed and agreed to get it recorded, but never did so, and sold and conveyed the land to another. The plaintiff, on discovering the fraud, requested the defendant to return the notes, or the deed, or to pay him the amount due. The

*Galloway v. Holmes.*

defendant refused to do either ; and the plaintiff thereupon brought *assumpsit* for the money. It does not appear but that the notes were all due at the commencement of the suit ; and the principle now under consideration does not seem to have been at all involved. It may be remarked, however, that the court, in deciding the case, referred to *Wilson v. Force*, and in general terms affirmed the doctrine there laid down.

Another case relied upon by the plaintiffs' counsel, is *Pierce et al. v. Drake*, 15 Johns., 475, where the defendant sold to the plaintiff notes and stock of the Otsego Card and Wire Manufacturing Company, and represented the company to be good and solvent, and the stock to be worth from twelve to fifteen per cent above par ; when, in fact, the company was insolvent at the time, and the notes and stock utterly worthless, which the defendant knew. By the agreement, the plaintiffs were to pay for the notes and stock in whisky, and they did so. Upon ascertaining the insolvency of the company, the plaintiffs offered to return the stock and notes to the defendant, and demanded payment for the whisky, which the defendant refused. Whereupon the plaintiffs brought *assumpsit* for goods sold, etc. The court again cite *Wilson v. Force*, saying "that case is in point to show that a note taken under such circumstances, is no payment. The fraudulent representations made by the defendant vitiated the whole contract as to the payment." Certainly so ; and the facts showing a clear obligation to pay for the property received, and there being no express agreement as to the time of payment, the law implied one to pay immediately.

In *Corties et al. v. Gardner et al.*, 2 Hall, 345, the plaintiffs (auctioneers) sold to the defendants a quantity of goods at auction, to be paid for in an approved indorsed note at six months. The plaintiffs, having delivered the goods, demanded the note, which being refused, they imme-

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Galloway v. Holmes.

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diately commenced an action for goods sold and delivered. The action was sustained. In this case the credit agreed upon was on condition that the defendants would give the note. They refused to comply with the condition, but retained the goods. There was then of course no agreement for time, and they most manifestly were liable immediately for the price of the goods.

Two cases referred to by plaintiffs' counsel in 1 *Esp. N. P. R.*, 430, and 2 *Esp. N. P. R.*, 523, seem to me to be in point, and to sustain fully the doctrine he contends for. It can only be said of them that they are *nisi prius* decisions, and conflict directly with a decision of the whole court subsequently made.

*Stedman v. Gooch*, 1 *Esp. N. P. R.*, 3, does not help the plaintiffs' case. The defendant owed the plaintiff a debt, and transferred to him in payment the notes of a third person, which were worthless. It was held that he might treat the notes as waste paper, and sue for the original debt. *Chitty on Bills*, 196, is to the same point, citing the last mentioned case and several others.

*Norris v. Aylett*, 2 *Campb.*, 329; *Abbotts and another v. Barry*, 2 *Brod. & Bing.*, 369; *S. C.*, 6 *E. C. L. R.*, 157; *Hill v. Perrott*, 3 *Taunt.*, 274; *Biddle & Loyd v. Levy*, 1 *Stark.*, 20; *Puckford v. Maxwell*, 6 *T. R.*, 52, referred to by the plaintiffs' counsel, do not conflict with the view which I have taken of this case, and do not require particular notice.

The counsel for the defendant, in resisting the plaintiffs' right to recover in this action, insists: 1. That if there was no fraud, the action was prematurely brought; the plaintiffs had no right to sue before the credit had expired. The correctness of this proposition is not denied, and is fully sustained by authority: 4 *East.*, 152; 3 *B. & P. R.*, 584; 2 *Stark. Ev.*, 55; 2 *Hall*, 347. 2. If there was fraud on the part of the defendant, and the

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Galloway v. Holmes.

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plaintiffs elected so to consider it, and sue immediately for the fraud, the action should have been trover, replevin, deceit, or a special action on the case. This position is also admitted and fully sustained by the books: 4 *Paige*, 541; *Com. Contr.*, 210; 15 *Mass.*, 156; 4 *Greenl.*, 319; 3 *Johns.*, 233; 10 *Johns.*, 172; 15 *Johns.*, 187; 6 *Cow.*, 110; 17 *E. C. L. R.*, 330. 3. That the contract was voidable merely, at the election of the plaintiffs, on account of the fraud; that if they elected to avoid it, the defendant had no right to the goods; that if they affirmed it, the goods then belonged to the defendant, and he could not have been sued for them until the credit had expired, and that the bringing of this action of *assumpsit* for the price of the goods is, of itself, an affirmation of the contract.

Several cases were referred to by the defendant's counsel; the leading one, however, was *Ferguson and another v. Carrington*, the trial of which at *nisi prius*, in 1828, is reported in 3 *C. & P.*, 457; *S. C.*, 14 *E. C. L. R.*, 387. The action was *assumpsit* for goods sold. Plea, general issue. It was proved that the plaintiff, a ribbon manufacturer, had sold to the defendant, a haberdasher, goods, and that the defendant had accepted bills for the price of them, which bills had not become due at the time of the bringing of the action. The plaintiff's counsel then proposed to call a witness to prove facts going to show that the goods were not bought for the regular purposes of trade, but with the fraudulent intent of selling them directly afterwards at an under price to raise money; claiming that, these facts being shown, the defendant could not set up as a defense, that the credit had not expired. This evidence being objected to as inadmissible in an action upon the contract for goods sold, the court decided as follows: "Lord Tenterden, C. J., The plaintiff alleges that the defendant did not buy these goods in the regular course

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Galloway v. Holmes.

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of trade, but that he bought them for the fraudulent purpose of having them resold at a less price; and the plaintiff wishes, as the time of credit has not expired, to abandon the contract and prove fraud. Now, this I think he cannot do, for he cannot treat it as a sale in one view and reject it in another." A nonsuit was entered. On a motion to set the nonsuit aside, the same judge held that although the plaintiff might perhaps have been entitled to maintain an action of trover, yet, if he went upon the contract, he must take that contract as it actually was, and must, if he affirmed the contract, affirm it altogether. On a motion for a new trial in the same case, argued in the King's Bench, the court gave the following opinion: Bailey, J., "The plaintiffs have affirmed the contract by bringing this action. The contract proved was a sale on credit, and where there is an express contract the law will not imply one." Littledale, J., "At the time when this action was brought, the defendant was not bound by the contract between him and the plaintiffs to pay for the goods. The plaintiffs claim to recover for breach of the contract." Parke, J., "As long as the contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action they affirm the contract made between them and the defendant;" 9 *B. & C.*, 59; 17 *E. C. L. R.*, 330.

The law of this case is affirmed expressly by Chitty in 1 *Chit. Pl.*, 157, and in *Chit. on Contr.*, 680, 681. In Perkins's edition of the last mentioned work, published in 1842, in support of the principle that bringing *assumpsit* is an affirmation of the express contract, if one exists, reference is made to the case of *Solway v. Fogg*, 5 *Mees. & Welsb.*, 81, which is stated thus: "Where A engaged to convey away certain rubbish for B, at a specified price, under a fraudulent representation by B, as to the quantity of the

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*Galloway v. Holmes.*

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rubbish, it was held that he could only recover the specified price, and could not rescind the contract and then sue for the real value of the work performed by him."

These authorities bear directly upon the question under discussion. *Ferguson and another v. Carrington*, is an exact parallel to the present case, and if decided upon sound principles, as I think is conclusively shown by a careful examination of all the authorities, it certainly places this case beyond controversy.

The doctrine established by the numerous cases which were cited by the plaintiffs' counsel to show that whenever a party may rescind an express contract, he may sue and recover upon an implied one, is not applicable to the case now before us. What is the rescission of a contract? In the cases referred to, and so in the books generally, it imports an entire abandonment of a contract by one party, on account of some act done, or omitted to be done, by the other, which puts it out of the power of the one or the other to perform it according to its terms. As if, on an agreement to buy a horse or other chattel, the price he paid, and the chattel is to be delivered on a subsequent day, and before that day arrives, the vendor sells the chattel to another. In such case, the buyer need not wait until the time fixed for the delivery of the thing purchased, but he may rescind immediately, and sue for the price paid. The rescission of a contract implies its prior existence and validity. If we suppose the contract between these parties to have been valid when entered into, what act has the defendant since done or omitted, that would justify the plaintiffs in rescinding it? None whatever.

A party is permitted to rescind an agreement, and bring his action to recover back money paid, or goods delivered under it, not on the ground that the contract was void in its inception, but upon the ground that the parties have both abandoned it. The one is presumed to have done

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Galloway v. Holmes.

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so by failing to perform some condition, or by depriving himself of the power to perform it; and the other in fact rescinds on account of such act or neglect. But what is the effect of such a rescission? Does it enable the party rescinding to enforce the original agreement? By no means. Suppose that A buys of B for \$50 a horse worth \$100, and pays the \$50 in hand, and B undertakes to deliver the horse in ten days, but before that time sells him to another. What is the remedy of A? He may, if he elect, rescind the contract and bring *assumpsit*—and for what? The price paid, and that only. He may restore himself to his original position. Is there any conflict with the rule that the law implies no promise where the parties have made an express one? None whatever. There is no express contract in the case supposed to repay the price of the horse, and both parties having impliedly abandoned the contract for the sale and purchase, the one holds \$50 in money belonging to the other, which he is bound to repay, and the law will presume that he promised to do so. But if the buyer does not choose to rescind the contract, he may, after the time fixed for the delivery, bring his action upon the case, declare upon the contract, and recover the value of the horse. Suppose again that B should take a stipulation from A, that he would deliver the horse at a time specified, or repay the purchase money in six months thereafter. And suppose further, that A should fraudulently induce B to make the contract, and to advance the price, intending at the time to sell the horse, and afterwards selling him to another. Could B in such a case rescind the agreement, and bring *assumpsit* immediately for the price paid? It seems to me that clearly he could not. He might disaffirm it, and recover his just damages, in an action on the case for the deceit, but if he would waive the fraud and sue upon the contract, he must abide by the contract as made.

Galloway v. Holmes.

It appears from the case reserved, that part of the demand was paid by the defendant to the plaintiffs, about one year after the commencement of the suit. The plaintiffs insist that such payment is an admission of the contract as declared upon; that it is equivalent to the payment of money into court. We think otherwise. It is sufficient, perhaps, to say that it was not a payment of money into court. We may add, however, that the payment appears to have been made many months after the defendant's debt had become due, as recognized and insisted on by him. Such a general payment of money to the plaintiffs would furnish no evidence that the defendant considered the contract first made with them at an end, and the one declared upon substituted for it.

It was also contended by the plaintiffs, that the law of the place where the contract was made, must govern this case; and, inasmuch as by the law of New York, where the goods were sold, the transaction was void for the fraud of the defendant, and a present right of action for the price of goods vested in the plaintiffs, this court will recognize that right, and administer the law of New York.

There is no doubt, that the law of the place, is the law of the contract. But the question is not now what right the plaintiffs acquired by the contract. It is admitted that as soon as the fraud was discovered, they had a right to disregard the contract, and sue immediately for the goods or their value. The difference here is, as to the remedy—the form of action.

Suppose the state of New York had provided by their law a new remedy for this class of cases, and excluded all others—a remedy unknown to our laws. Would our courts administer such remedy, as part of the law of the contract? Or, suppose our own legislature had abolished the action of general *indebitatus assumpsit*; could it be resorted to by these plaintiffs, because their contract would

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Galloway v. Holmes.

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be enforced by such action in the state of New York? I apprehend neither proposition will be seriously affirmed.

The counsel for the plaintiffs themselves seem not to have considered the form of the remedy, as part of the contract. They have commenced their action by a special proceeding *in rem*, entirely unknown to the laws of New York, and which, but for our own statute, they could not have resorted to at all.

The numerous authorities cited upon this point, by the plaintiffs, all sustain the view we have taken of this question. They show conclusively, that the form of action is governed entirely by the law of the country where the action is brought. Whatever is of the substance of the contract, is controlled by the law of the place where it was made. "It is," says Justice Story, "universally admitted and established, that the forms of remedies, the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted:" *Story's Conf. of Laws*, 468. The *Bank of the United States v. Donnally*, 8 Pet., 361, sifts the whole doctrine upon this subject to the very bottom, and puts this question entirely at rest.

But, were we governed by the law of New York, I do not think the result would be varied; none of the New York cases have gone the length necessary to sustain this case. We have seen that they are all clearly distinguishable from it.

Another, and the last question presented for our consideration is, whether the filing the declaration *after* the term of credit agreed upon had expired, and the cause of action had accrued, was sufficient to entitle the plaintiffs to recover. We were referred to several English cases, to show that a *capias* may issue before the cause of action has accrued. These cases arose in the court of King's Bench. The question they decide is not whether

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*Galloway v. Holmes.*

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a suit may be commenced before the cause of action has accrued; they assume that it cannot; but the point considered is, as to what shall be deemed the commencement of the suit. And they decide that it is the filing the bill of Middlesex, and not suing out the *latitat* or writ. If the filing the declaration in actions commenced by attachment, under our statutes, be the commencement of the suit, the authorities referred to are directly in point; otherwise not at all. By our statute, "all civil actions, except those founded on *scire facias* or other special writs, or, excepting as hereinafter provided (referring to the commencement of suits by declaration), shall be commenced by original writ?" *R. S.*, 418, § 2. How are actions, founded on those special writs, commenced? By the writs themselves, unquestionably. Such is the obvious construction of the language of the statute, in reference to writs of attachment. Such is the construction it has uniformly received, and we perceive no reason for giving it a different one now. The act which authorizes a creditor to proceed against the property of his debtor in this form, provides that such creditor, or some person in his behalf, shall make and file with the clerk of the proper Circuit Court, an affidavit, stating that the defendant against whom the attachment is requested, is justly indebted to such creditor in a certain sum, and that the same is due upon a contract, etc. Without deciding in this case whether or not creditors, other than the original plaintiff in attachment, may file declarations upon causes of action which had not accrued at the time the writ was sued out, we feel no hesitation in determining, that the plaintiff must have cause of action existing at the time of filing the affidavit, and suing out the writ.

The opinion of this court, then, upon the question reserved, and to be certified to the Circuit Court for the county of Wayne is, that, inasmuch as the goods mentioned

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Green v. Graves.

were sold by the plaintiff to the defendant, upon a credit, and the term of the credit agreed upon had not expired at the commencement of the suit, this action of *assumpsit* for goods sold does not lie to recover the price of the goods. It was prematurely brought.

GOODWIN, J., did not participate in the decision, the cause having been argued before he took his seat upon the bench.

*Certified accordingly.*

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Green, Receiver of the Bank of Niles, v. Graves.

So much of the "Act to organize and regulate banking associations" (S. L. 1837, p. 76), as purports to confer corporate rights upon the associations organized under its provisions, is in violation of the second section of the twelfth article of the constitution of this state, which declares that "The legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house," and is, therefore, void. (a)

Case certified from St. Joseph Circuit Court. *Assumpsit* upon a promissory note made by the defendant, for the sum of \$100, dated the 22d day of July, 1838, and payable to the Bank of Niles. The declaration set forth the note, and averred that the Bank of Niles was an institution organized under the act to organize and regulate banking associations, approved March 15th, 1837, and that, on the 14th day of September, 1839, the plaintiff was duly appointed by the chancellor, receiver of the property and effects of that institution. The defendant demurred generally to the declaration; insisting, as the sole ground of the demurrer, that the bank never had any legal existence, the act under which it was organized being unconstitutional and void.

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(a) See Brooks v. Hill, 1 Mich., 116; Comstock v. Draper, *Ibid.*, 481; State v. Howe, *Ibid.*, 512; 2 Mich., 287; 16 Mich., 254 255.

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*Green v. Graves.*

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*T. Romeyn*, in support of the demurrer.

*Green & Dana, contra.*

WHIPPLE, J., delivered the opinion of the court.

In support of the demurrer, it is insisted that the act to organize and regulate banking associations, under which the Bank of Niles was organized, is repugnant both to the letter and to the spirit of the second section of the twelfth article of the constitution of this state, which provides, that "The legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house."

The authority of this court, to declare laws which are passed in violation of the constitution, void and inoperative, cannot be questioned. The duty to do so, when a proper case is presented, is imposed upon us by the constitution, and by our oaths of office. We feel bound to consider and decide questions of this nature with great deliberation, but at the same time with great firmness. And it may be proper here to remark, that we adhere to the rule sanctioned by the Supreme Court of the United States, and adopted by this Court, the wisdom and propriety of which is unquestionable, that, to authorize the judiciary to pronounce a law unconstitutional, the conflict between the constitution and the law must be apparent and palpable; an infraction of the provisions of the former must be established beyond all reasonable doubt; otherwise the law must be sustained. Considerations of mere expediency can never legitimately enter into the discussion of questions involving the constitutionality of a law. The only question that can be considered is one of *power*.

A brief analysis of the "act to organize and regulate banking associations," is necessary to the right understanding of the question presented for our consideration.

The first section provides that, "whenever any persons resident in any of the counties of this state shall be desirous

*Green v. Graves.*

of forming an association for transacting banking business, such persons shall make a written application to the treasurer and clerk of the county where such business is proposed to be transacted; which application shall set forth the amount of the capital proposed to be used by such association, and the place proposed to locate the office for the transaction of the business of said association; and on application made as aforesaid, by at least twelve freeholders, resident of any such county, it shall be the duty of any such treasurer and clerk to cause public notice thereof to be given, at least thirty days, in some public newspaper published in such county," etc., "which notice shall set forth the amount of capital proposed to be used by such association, and designate the time and place of opening books to the capital stock thereof."

The third section prescribes that the capital stock of such associations shall not be less than fifty thousand dollars, nor more than three hundred thousand dollars.

The fourth, fifth, sixth and seventh sections relate to the manner of opening the books of subscription, the distribution of the stock, the election of officers, etc.

The ninth section provides that "all such persons as shall become stockholders of any such association, shall, on compliance with the provisions of this act, constitute a body politic and corporate, in fact and in name, and by such name as they shall designate and assume to themselves, which name shall not be changed without the consent of the legislature; and by such name they and their successors shall and may have continual succession, and shall in their corporate capacity be capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever; and that they and their successors may have a common seal, and that they and their successors by such name as they shall designate,

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Green v. Graves.

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adopt and assume as aforesaid, shall be in law capable of purchasing, holding and conveying any estate, real or personal, for the use of the said association.

These sections of the act clearly indicate its nature, and show that the associations formed under its provisions are *corporations*. They possess all the characteristics of corporations, and must have been so declared to be, had not the legislature thought proper so to designate them.

Before testing the act by the constitution, it is proper to state here some of those general rules, of universal application, by which courts are guided in the interpretation of laws. Among these rules are the following: 1. The words of a statute are to be taken in their ordinary signification and import. 2. The real intention, when accurately ascertained, will always prevail over the literal sense of terms: 1 *Kent's Com.*, 462; *Dwarris on St.*, 40. 3. The reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction or absurdity. 4. When the words are not explicit, the intention is to be collected from the occasion and necessity of the law, from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. 5. The cause or reason of the act may either be collected from the statute itself, or discovered from circumstances extrinsic of the act: *Dwarris on St.*, 44. 6. The construction to be put upon the act must be such as is warranted by, or at least not repugnant to, the words of the act; and where the object of the legislature is plain and unequivocal, courts ought to adopt such a construction as will best effectuate the intentions of the lawgiver; but they must not, in order to give effect to what they suppose to be the intention of the legislature, put upon the provisions of a statute a con-

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Green v. Graves.

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struction not supported by the words, though the consequence should be to defeat the object of the act.

I have thought it most convenient thus to collect and state the foregoing rules, as I shall have occasion to apply them in the course of this opinion. They are equally as applicable to the interpretation of written constitutions, as of statutes. The want of skill and foresight, and the imperfections of language, give rise to the same doubts and difficulties in the construction of the one as of the other; although, from the greater care and deliberation exercised in the formation of written constitutions, the difficulties in their interpretation arise less from looseness or ambiguities in expression, so often found in statutes, than from the difficulty in ascertaining the true object, scope and spirit of those broad principles of fundamental law, which can only be expressed in general language.

I will now proceed to consider the natural import of the words used in that provision of the constitution, which it is contended has been violated by the act in question. Under the territorial government, and under the state government until the general banking law was passed, the usual mode of creating a corporation was by a special act adapted to each particular case. With respect to banks or moneyed corporations, the practice was uniform; the only exceptions to the general rule embraced a class of corporations denominated *quasi*-corporations. It is fair then to infer, that when the framers of the constitution made use of the words "act of incorporation," they had reference to the practice which had prevailed from the organization of the territorial government down to the period of the adoption of the constitution. A general law, by which individuals, to the number of twelve, could multiply indefinitely moneyed corporations, was unknown in the history of legislation, either in this state or any other state or country. It is an invention of modern times. It

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Green v. Graves.

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was the fruit of a distempered state of the public mind. It had its origin at a period, and under circumstances, well calculated to tax the ingenuity of even legislators, to invent means, by which moneyed institutions, so called, might be brought into existence, without going through the dry, tedious, and expensive process, of passing an act in each particular case. The public voice demanded a machine which might operate with more celerity, and be put in motion at any time without the special intervention of the legislature, which sat but once a year, and for a short period. The circumstance, then, that the mode devised by the legislature for establishing banks was unknown, may be properly considered, in giving a construction to the constitutional provision under consideration.

Again: do not the words "the legislature shall pass no act of incorporation," etc., necessarily imply that the act itself would create the corporation? Such would seem to be the plain meaning of the words. If the language of the constitution had been, "the legislature shall pass no act *for the creation of corporations*," etc., a different interpretation would have been warranted, and the enactment of the general banking law might have been justified. But the words actually employed by the framers of that instrument, would appear to negative the idea that a corporation could be created in any other manner than by the direct act of the legislature. In written constitutions, we are accustomed to look for, and have a right to expect, clearness and perspicuity of style and language. Each provision is presumed to have been deliberately considered and carefully guarded, so as to leave room for doubt or uncertainty. The history of the past had offered admonitory lessons of the danger of using language which might admit of a twofold construction, and thus subject the fundamental law to be molded in such form as to suit the purposes of those who might invoke the aid of the legis-

*Green v. Graves.*

lature, in carrying into effect some favorite scheme, not warranted either by its letter or spirit; and the position I held in the convention enables me to state, that unusual care was taken by that body, to avoid the evils which inevitably flow from inattention in the use of language.

Where a provision of the constitution is couched in language explicit and clear, this court is restrained from enlarging or restricting the plain and obvious import of such provision. We are bound to presume that the framers of that instrument intended to do precisely what they purport to have done. Neither the legislature nor the judiciary can enlarge or limit the meaning of a provision, when its language admits of but one construction. If this were permitted, constitutions would be of little value. Interpolations would from time to time be made by legislatures and courts, and the result would be, that, instead of a constitution and form of government traced by the hand of the people, we should have a constitution possessing, it is true, some of the features which belonged to the original, but so unlike it in other respects, as to be difficult of recognition; in other words, we should have a constitution with the will of the legislature and courts impressed upon it, rather than the will of the people. Against such evils we must guard; to the exercise of such power, we are bound to oppose a firm resistance.

It is fully admitted that, in the absence of any constitutional inhibition, it would be competent for the legislature to give a general power to erect corporations indefinitely: *Angell & Ames on Corp.*, 45. This power might be vindicated on the principle that *qui facit per alium, facit per se*; the persons to whom such power is delegated being only instruments in the hands of the government. Do the words, then, of the provision under consideration limit this power? If a literal construction is to be given to that provision, it would certainly indicate an intention on the part of the

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Green v. Graves

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makers of the constitution to restrain the legislature from the exercise of such a power. If not, why use the words, "the legislature shall pass *no act* of incorporation," etc., implying, *ex vi termini*, that the "act" should constitute the corporation? If the makers of the constitution intended to restrain the legislature from granting, by a general law, a license to individuals to erect corporations, why did they not employ language less liable to misconstruction? Why, for instance, was not the provision couched in the following language: "The legislature shall pass no act for the creation of incorporations within," etc.? In 6 *Bac. Abr.*, 377, the following rule is laid down: "If an affirmative statute, which is introductory of a new law, directs a thing to be done in a certain manner, that thing shall not, even although there be no negative words, be done in any other manner." I have endeavored to show, that if we are to confine ourselves to a literal construction of the constitution, it is quite apparent that an act of incorporation cannot be passed, unless it receive the assent of at least two-thirds of each house. This, then, is the "certain manner" in which the "thing is to be done." Have the legislature prescribed, in the act, another "manner" in which the "thing is to be done?" I think they have. That act does not create incorporations; but is a general license to individuals to do certain things, which things, when done, shall constitute them a corporation. I think then that the letter of the constitution prescribes but one mode by which an act of incorporation may be passed, and a corporation created, and that it contemplates the *direct* vote of the legislature upon *each and every* act of incorporation.

This view of the constitution is strongly fortified by the opinion of Chief Justice Nelson, in the case of *Thomas v. Dakin*, 22 *Wend.*, 76. He says, "Two different constructions of the 9th section are claimed. For the defend-

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Green v. Graves.

ant it is urged, that according to its true intent and meaning, *each corporation* thereafter to be created by the legislature, must receive the *direct assent* of two-thirds of the members elected. While for the plaintiff it is insisted, that the provision is fairly complied with, when the assent of two-thirds is given to a general statute, establishing a system for the admission of voluntary associations to corporate privileges; in other words, when the *assent is indirectly given* to the creation of each. If we regard the clause as intended to check the undue multiplication of these bodies, it is quite clear that the former interpretation will most effectually attain the object. It secures a perpetual restraint upon the creation, both in respect to the deliberation and judgment to be bestowed, as well as to the assent to be given, in each particular application; whereas, in the case of a general law, when once enacted, all further check upon the legislature is at an end."

The chief justice further remarks in another opinion, that to create a corporation by "bill would seem naturally enough to require that the bill should purport, on the face of it, to create one; that the corporate body should be the direct result of its enactment into a law." I can add nothing to the force of these views; they seem to me to be conclusive of the question. And yet that learned judge sustained the general banking law of New York; although he very frankly admits that the words of the clause are not decisive upon either view, nor their legal import free from doubt and difficulty. "In such case," says the chief justice, "I agree that the court ought not to pronounce the statute unconstitutional." Judge Cowen, who agreed with the chief justice in sustaining the statute, remarks that "the restriction intended to be imposed, I am of opinion, relates entirely to the members whose assent is required, and not to any particular form in which the corporation is to be created, nor to the number

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Green v. Graves.

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of corporations provided for by the bill." And after remarking that the legislature of that state exercised the right of passing general statutes authorizing associations of individuals to incorporate themselves, he adds, "We must understand the constitution as recognizing the known modes of legislation, when nothing is said in it to the contrary." Bronson, J., did not concur in the opinion of the chief justice and Mr. Justice Cowen, "that the legislature had the constitutional power, although two-thirds may assent, to provide by a general law for the creation of an indefinite number of corporations." It is well to notice here, that the chief justice construes the section in the constitution of New York to mean the same as if the phrase "*by law*," had been used instead of "*by bill*;" so that the clause would then read, "The assent of two-thirds," etc., "shall be required by every law creating," etc. If the chief justice was right in this construction of the section in the constitution of New York, it may be well doubted whether upon the face of the instrument itself, the conclusion to which he came was not warranted. But the language of our constitution is essentially different. "The legislature shall pass *no act of incorporation* unless," etc. I took occasion to say, in a former part of this opinion, that if the clause in our constitution had been "the legislature shall pass no act (law) for the creation of corporations," etc., a different interpretation would be warranted; for it must be admitted that there is a wide distinction between the words, "the legislature shall pass no act of incorporation," and the words "the legislature shall pass no act for the creation of corporations," etc. When we speak of an act of "incorporation," we mean the act by which the corporation is created; when we use the word "corporation," we mean by it the *political institution* itself: *Angell & Ames on Corp.*, 3. The language of the constitution implies that each individual corporation should be the cre-

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Green v. Graven.

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ation of a special act of incorporation, while the words, "the legislature shall pass no act for the creation of *corporations*," might justify the conclusion that the legislature could authorize the *creation of corporations*, to an unlimited extent, by a general law. Upon a careful examination of the case of *Thomas v. Dakin*, I have come to the conclusion that it cannot be relied upon very strongly, as supporting the constitutionality of the general banking law of this state. The chief justice admits that a doubt exists as to the true construction of the constitution, and very properly sustained the law. Mr. Justice Cowen agreed with the chief justice in sustaining the law, while he disagreed with him respecting the object of the restriction contained in the constitution, and laid much stress upon the fact that the convention, which revised the constitution in 1821, were well advised that general laws had been passed, authorizing associations to form themselves into a corporation, and insisted that the court were bound to presume that, if the restraint contended for had been desirable, they would have imposed it in a clear and intelligible form. Mr. Justice Bronson, as I have before remarked, considered the act as a violation of the constitution.

While the "bill to authorize associations for the purpose of banking" was under consideration in the legislature of New York, doubts arose as to its constitutionality, and a resolution was adopted calling upon the attorney-general for an opinion upon that question. That opinion was given by Mr. Beardsley, then attorney-general, in which he declares that the provisions of the bill were repugnant to the constitution, and sustains his views in a brief but masterly argument. I do not cite that opinion as *authority* in this case, but refer to it to show the views of a lawyer of acknowledged ability upon a question of great public interest; and as entitled to some consideration, as it was given officially, and at the request of the legislature.

*Green v. Graves.*

The great questions involved in the case of *Thomas v. Dakin*, were considered by the Court of Errors in New York in the case of *Warner & Ray v. Beers*, 23 Wend., 103. The cause was argued with great ability by eminent counsel. Opinions were delivered by the president of the senate, Mr. Bradish, the chancellor, and Senators Root and Verplanck. The court, however, came to the conclusion, that the associations formed under the law of New York *were not corporations*, and, of consequence, no decision was pronounced upon the question arising in this case.

I have laid it down as a sound rule of construction, that the real intention, when accurately ascertained, will prevail over the literal sense of terms; and further, that the reason and intention of the lawgiver, will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, or absurdity.

It becomes necessary, then, to inquire into the reasons and object of the constitutional provision in question, that we may be able to determine with accuracy its true spirit and meaning. The restriction contained in the provision is unusual, and repugnant to all our notions of a representative government, where the vote of a majority controls in primary assemblages of the people, at an election, in our legislative halls, and in courts of justice. So deeply has this principle taken root, that the patriotism of an individual is questioned, who does not readily submit to the will of a bare majority, in all cases where the voice of that majority is, by the constitution, or law, declared to be decisive. The framers of the constitution, therefore, in incorporating into that instrument a rule in opposition to a principle which lies at the foundation of our political system, must have found their justification in the conviction that such a provision was called for by imperious necessity, or from motives of policy, so strong and overrul-

*Green v. Graves.*

ing, as to authorize an innovation of a long established and deeply cherished maxim. Let me now advert to some of those "circumstances extrinsic of the act," for the purpose of discovering the reason or "cause of the act." The constitution of Michigan was formed in 1835. All who are familiar with the history of that period will bear testimony to the fact, that a strong public feeling existed against corporations, and especially in respect to those possessing banking powers. It may be said to have been the absorbing question of the day. The community were alarmed at the vast increase of corporations. They feared the power which such institutions were capable of wielding. The belief was entertained that this power had actually been wielded for bad purposes. It was argued that all corporations were, in a greater or less degree, monopolies, and hence the prejudices of the community were arrayed against them. It was alleged that, notwithstanding the gross corruptions and fraudulent conduct of banking corporations, they could not be reached, or be made amenable to justice and the violated laws of the country. It was boldly charged that bribery and corruption had been resorted to for the purpose of procuring or perpetuating charters. Regarded as contracts between the state and the company, they could not ordinarily be affected by legislative interference. Immunity was offered to the persons and property of the corporators, not invested in the corporate stock. Such were some of the circumstances under which the provision was incorporated into our constitution, circumstances well calculated to challenge the attention of the convention, and induce that body to devise new guards, by which the community might be protected against the evils growing of legislation in respect to corporations. But the object they had in view could not be achieved, unless some statutory check was imposed, by which to prevent the multiplication of

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Green v. Graves.

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corporations. This was the crying evil ; for, in proportion as they increased, in just that proportion would the evils to which I have adverted increase also. Chancellor Kent, who was a member of the convention that revised the constitution of New York in 1821, says that the convention "endeavored to check the improvident increase of corporations, by requiring the assent of two-thirds of the members elected to each branch of the legislature, to every bill for creating, continuing, altering or renewing any body politic or corporate :" 2 *Kent's Com.*, 271. Mr. King, who was also a member of the convention, and chairman of the committee on the legislative department, in reporting the section embodied in the constitution, referred to by Chancellor Kent, remarked that "the committee looked upon the multiplication of corporations as an evil," and that "they ought not to be increased, but should be diminished as far as could be done consistently with the preservation of vested rights." If such were "the extrinsic circumstances" and the reasons which induced the convention that framed our constitution to impose the restriction, is it not indisputable that we can give full effect to the intention of the framers of the constitution, and of the people by whom it was ratified, only by insisting upon such a construction as the words themselves justify ; and that to affirm the general banking law of this state constitutional, would be warranting an interpretation at war both with the letter and spirit of that instrument ? Indeed, Chief Justice Nelson, in the case of *Thomas v. Dakin*, admits that the *intention* of the framers of the constitution of New York, would be best fulfilled by the construction contended for by the defendant. If such be the case, and the letter of the clause in question not only warrants, but demands a literal construction, I know of no power less potent than that of the people, competent to change, alter, or modify the clause. We are the mere

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Green v. Graves.

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creatures of the constitution, bound by the highest motives to preserve it unimpaired, as it came from the hands of those by whom it was ordained and established. We do not sit here to make constitutions and laws, but to expound them. Who that is familiar with the opinions of the convention, or has consulted the journal of its proceedings upon the subject of corporations, can hesitate as to the true construction of the clause relating to this subject? Those opinions were hostile to the multiplication of corporations. Not only is this manifest from the clause itself, which requires a vote of two-thirds of each house to pass an act of incorporation, but the journal shows that that clause was *unanimously* adopted. That member would have been regarded as insane, who should have offered a separate proposition, or a proviso to the clause as it now stands, granting to the legislature a power to pass a general law, for the erection of moneyed corporations, at the will of any twelve inhabitants of the state. He would have been told that the proviso would not only defeat the object intended by the clause, but would be inconsistent with its letter, which contemplated that the discretion and judgment of the legislature should be applied to *each* and *every* act of incorporation. He would have been told, just as the legislature was, by whom the act in question was passed, that in less than one year after its adoption, more banks would spring into existence than there were organized counties in the state; and thus a clause, itself intended to guard the community against a state of things so fraught with mischief, would be defeated by the proviso. He would have been told, that the true policy of the people of this state, whose pursuits are essentially agricultural, would be to restrain, rather than extend, the facilities for multiplying banks. He would have been told that the experiment of creating banks in this way was yet unknown and untried; an experiment too bold and dangerous

Green v. Graves.

for a people then taking initiatory steps to form a state government, with a population of only 100,000; that such an experiment had better be left to old and wealthy states. And who can doubt the wisdom and policy of the provision, as we find it in the constitution? If we consult the past, a lesson may be read well calculated to admonish the future legislatures of this state of the imminent peril of projecting measures relating to banking and currency; that it is a subject too delicate, and too closely interwoven with the best interests of society, to be inconsiderately tampered with; that it will not do to vest every twelve individuals in this state with the immense power of erecting, *ad libitum*, banking corporations, each with a capital of \$300,000, based upon bonds, and secured by mortgages upon wild and uncultivated lands. And yet it has been gravely argued that, notwithstanding the inhibition in the constitution, that law can be sustained, which violates its letter and spirit; that law which gave birth in twelve short months to some forty banks, with an aggregate capital of nearly \$4,000,000, while there were in existence eighteen chartered banks, with an aggregate capital of over \$2,000,000; that law whose history was blackened with frauds and perjuries; under the operation of which individual and state credit staggered and at last fell; a law which brought odium and reproach upon the state within a year after its enactment. I have not been unmindful of the fact that the policy of the act was attempted to be vindicated, upon the ground that, under the system of creating private corporations, which prevailed before the adoption of the constitution, but comparatively a small number of the community could participate in the rights, privileges and profits of banking; whereas, under the general law, the many might have privileges which before were enjoyed by the few; and hence the doctrine of equal rights and equal privileges, so much cherished by

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Green v. Graves.

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the people, was respected. In other words, that the law struck a death-blow at the monopoly, which previously existed. This reasoning is plausible; but is it sound? All corporations are to a certain extent monopolies. In the language of Mr. Justice McLean, in the case of *Beatty v. Knowles*, 4 Pet., 168, the "exercise of the corporate franchise is restrictive of individual rights." If so, it is difficult to sustain the construction contended for by the plaintiff, on the ground of policy; for in proportion as corporations are created, in the same proportion are the rights of individuals restricted; so that, although more individuals would, under the general banking law, become members of banking corporations, yet the consequence would be an increase of institutions admitted to be monopolies, and restrictive of individual rights. The remedy for the mischief, then, would certainly be worse than the mischief itself; and I think a community, like an individual, should endure a lesser evil, if, in attempting to cure it, a greater one would be entailed upon them.

The case of *Falconer v. Campbell*, 2 *McLean*, 195, sustains the constitutionality of the "act to organize and regulate banking associations." It is an authority entitled to respectful deference, and I should have been better satisfied with my own conclusions, had they been sustained by the distinguished man and able judge who delivered the opinion in that case. I have had occasion, already, in the course of this opinion, to express my views upon most of the reasoning upon which this decision of Judge McLean was based. One or two other points, however, remain to be considered. It is said that, notwithstanding the restrictive clause in our constitution, it would clearly be competent for the legislature to create several corporations in one act, and, if so, then an indefinite number may be embodied in one act; and if an indefinite number may be embodied in one act, why may not the legislature pass

Green v. Graves.

a general law, authorizing the erection of an indefinite number of corporations, by the voluntary association of any given number of persons? It is not to be denied that there is plausibility in this reasoning. It is fully admitted that an act creating several corporations would be valid and constitutional. It would not violate the spirit of the prohibitory clause in the constitution, for the reason that the judgment and discretion of the legislature would be applied to each incorporation contained in the act; the responsibility of sanctioning each would be direct; whereas, in a law like that under consideration, the whole power and responsibility of erecting corporations is transferred, in fact, from the legislature to twelve or more individuals. This the framers of the constitution never contemplated. They intended that the legislature should be *directly* responsible to the people, for *each and every act of incorporation* they might in their discretion pass. To illustrate what I esteem a very strong view of the case: At the time the general banking law was passed, there were two banking institutions in an interior village containing a population of a few hundred inhabitants; one chartered under the old territorial government, and the other by the first legislature that assembled under the state government. The second legislature passed the general banking law; and in a few weeks, or months, three or four additional banks came into existence under its provisions, and the singular spectacle was exhibited, of five or six banks in a small village. Upon whom did the responsibility rest of creating these banks? Why, clearly upon those by whose *direct* agency they were brought into being, and not upon the legislature who gave a general license permitting the creation of an indefinite number of banks. It is true, that that legislature might be directly responsible *for passing the law granting the license*, but they certainly are not to bear the further burden of being respon-

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Green v. Graves.

sible for the acts of those who choose to avail themselves of the provisions of the law. If this process of reasoning be correct, it is too plain to need illustration that the true spirit and meaning of the constitution was violated; for, by that constitution, it was clearly intended that each corporation should be created by the *direct* agency of the legislature, who should be responsible to the people for the discharge of the high trust reposed in them, and not shift off that responsibility on others to whom the trust of creating banks was never intended to be confided.

But it was contended in argument, that there had been a direct legislative sanction of the incorporation of the Bank of Niles, by an amendatory law which took effect on the 10th of January, 1838. This law covers the whole ground occupied by the original act, with some modifications of a salutary nature, and declares that all banking associations, incorporated under the act to which it was an amendment, should, within ninety days from the passage of that act, give the security required by the 6th section of that act, and should, in all other respects, be subject to, and governed by the provisions of that act. The reasoning of Mr. Justice McLean, as to the effect of this amendatory law, is as follows: "If it were then admitted, that under the first act the associations formed were not incorporated, are they not incorporated by the second? Its provisions confer corporate powers, and they apply to associations then subsisting under the former law. This designates these associations with as much certainty as if they had been specially named in the amendatory act; and can there be any doubt that this act would confer corporate powers on these associations, if, under the former, they had not received them? As it regards banking associations then subsisting, it could not be contended that the legislature disregarded the restrictions of the constitution, by creating or authorizing an indefinite number of banks.

*Green v. Graves.*

These institutions were in operation ; they were known and expressly sanctioned, and provisions which conferred corporate powers, were made to embrace them." The position assumed by counsel, and laid down by Judge McLean, is this : that, admitting the original act to have been unconstitutional, and of consequence the institutions organized under its provisions to have been utterly void, yet, as the legislature did, by the amendatory act, reorganize them as existing corporations, those institutions which were before void, became, by virtue of the last act, valid. I am not prepared to admit, to the extent claimed by counsel, the potency of a legislative recognition of a corporation created by an act which was passed in violation of the constitution, and of course originally void. It is unnecessary to determine the effect in this case of such a recognition, inasmuch as the whole argument rests upon the assumed ground that, "to pass the amendment, the constitutional majority was necessary;" by which I understand that the amendatory act, in order to be valid, must have been passed with the concurrence of *two-thirds of each house*. But, is this true ? Is such a construction warranted by the constitution, or the practice of the legislature under the constitution ? I think not. The restriction with respect to the creation of corporations, contained in our constitution, was borrowed from the constitution of New York, which provides that "the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill creating, continuing, altering or renewing any body politic or corporate." The language of our constitution is, "the legislature shall pass no act of incorporation unless with the assent of at least two-thirds of each house." The restriction in the constitution of New York, it will be perceived, extends to the "creating, continuing, altering or renewing any body politic or corporate," while, in our constitution, the restriction

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Green v. Graves.

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extends simply to the power of the legislature to "pass" an "act of incorporation." I have had occasion to remark, that the restraint imposed is unusual, and cannot, therefore, be extended to a case not warranted by the words of the constitution. To *pass* an act of incorporation is one thing; to *alter or amend* an act of incorporation is another, and a different thing. The framers of the constitution, may have thought it wise to require two-thirds of the members of each house to pass an act of incorporation, but unwise to extend the restriction so far as to require a vote of two-thirds to alter or amend such act. But we are not left to grope our way in the dark on this subject.

By reference to page 180 of the journal of the convention, it appears that the following provision was adopted, in committee of the whole, by the convention: "The legislature shall pass no act of incorporation unless with the assent of at least two-thirds of each branch thereof; and every act of incorporation shall contain a clause reserving to the legislature the power to alter or repeal it: Provided, that it shall require two-thirds of all the members elected to both houses to repeal any such act of incorporation." It is manifest from this provision, that, while two-thirds of the members of each house were required to *repeal* an act of incorporation, a mere majority was sufficient to *alter* it. Subsequently, the provision was amended by striking out all after the word "thereof." The practice of the legislature under the restrictive clause, it is believed, has been consistent with the constitution as it now stands, and with the views of the convention expressed in the provision above quoted. The question arose in the first house of representatives which assembled under the constitution, and it was then decided that the restriction did not apply to bills amendatory of existing acts of incorporation. The same decision was made by me at the same session, while speaker of the house of repre-

*Green v. Graves.*

sentatives, and sustained by that body. What the practice has been since that time, I have not had the leisure to examine into and determine. Whatever that practice may have been, however, I think it too clear for argument that the constitution does not warrant the construction contended for, nor was it intended by its framers that the assent of two-thirds of each house should be necessary to amend an act of incorporation. It may be stated here as a fact, that the amendatory act passed the house of representatives by a vote of 25 to 11, and the senate by a vote of 9 to 6.

It is to be lamented that the grave question we are now called upon to decide, was not presented to this court at an earlier period, and immediately after the passage of the obnoxious act. Our decision would have stayed the torrent which has swept over the state with effects so desolating, and preserved individual and state credit from the stigma and reproach which befell both; and I regret that the question has now been forced upon our notice, satisfied, as I am, that the public interest, under existing circumstances, would be best promoted by sustaining the law.

The result of our deliberation then, is, that so much of the act under which the Bank of Niles was organized, as purports to confer corporate rights upon the associations organized under its provisions, is unconstitutional and void; and that the demurrer in this case must be sustained.

RANSOM, C. J., and FELCH, J., concurred in this result, but thought that the question of whether, under the constitution, the legislature had power to *alter* or *amend* an act of incorporation by a mere majority vote, as held by WHIPPLE, J., was not involved in this case, and therefore, on this point, they declined expressing any opinion.

GOODWIN, J., not having heard the argument, did not participate in the decision.

*Demurrer sustained.*

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*Joy v. Thompson.*

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*Joy v. Thompson.*

A verbal promise made since, to pay a simple contract debt barred by the statute of limitations before the Revised Statutes of 1838 took effect, will not revive the cause of action, but such promise must be in writing as required by section 18, p. 578, of the Revised Statutes. (a)

This construction of the statute does not give it the effect of violating the obligation of contracts.

This action was originally brought by Joy against Thompson, before a justice of the peace, February 24, 1843. The declaration was in *assumpsit* upon a promissory note made by the defendant, May 1, 1822, and payable on the first day of October, in the same year. Pleas, *non-assumpsit*, and *actio non accrevit infra sex annos*. Replication, that the defendant did promise, etc., within six years. On the trial the plaintiff proved a verbal promise to pay the note, made by the defendant in June, 1842. The defendant contended that this was insufficient, and that since the Revised Statutes of 1838 took effect, the promise, in order to take a case out of the operation of the statute of limitations, must be in writing. The justice gave judgment for the defendant. Whereupon, the plaintiff removed the cause into Wayne Circuit Court by *certiorari*, and Justice WHIPPLE, then presiding in the Circuit Court, certified the case to this court for its opinion upon the question arising therein.

*E. Taylor*, for the plaintiff.

*A. Harvie*, for the defendant.

GOODWIN, J., delivered the opinion of the court.

The simple question presented by this case is, whether, since the Revised Statutes came into operation, a verbal promise will revive a cause of action upon simple contract,

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(a) Same principle: *Lastly v. Cramer*, 2 Doug., 307; *Campan v. Chene*, 1 Mich., 409-410; *Hulbert v. Merriam*, 3 Mich., 144; *Perry v. Hepburne*, 4 Mich., 166; *Stambaugh v. Snoblin*, 32 Mich., 236.

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*Joy v. Thompson.*

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previously barred by the statute of limitations. The determination of this question depends, mainly, upon the construction and effect to be given to the different sections of chap. 2, title 6, part 3, of the Revised Statutes, entitled, "Of the limitations of personal actions," which took effect September 1, 1838.

It is a rule of interpretation, in construing statutes, that all the different parts are to be taken together, as well as other acts *in pari materia*, in ascertaining the intention of the legislature; and that effect, if it can be done, is to be given to every part, so that no portion of it shall be left inoperative. And, in taking the different sections of this chapter, bearing on the question, I have had no difficulty in arriving at what was the intention of the legislature.

The 13th section, which is relied on by the plaintiff, provides that, "In actions of debt or upon the case, founded on any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take a case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party to be charged thereby;" *R. S.*, 578. This is, in its language, broad and general. In the 27th section it is provided, that, when the cause or right of action shall have accrued prior to the time when the Revised Statutes were to take effect, "it shall not be affected by this chapter, but all such causes of action shall be determined agreeably to the law under which the right of action accrued;" *R. S.*, 580. This section, which is also very broad, it is contended, exempts previously existing causes of action from the operation of the before recited section, as well as the residue of this chapter.

The 25th section provides, that "No personal action shall be maintained which, at or before the day when this

*Joy v. Thompson.*

chapter shall take effect as law, shall have been barred by the statute of limitation in force at any time before that day." *R. S.*, 580. This provision, equally broad with the others in its terms, it is contended, prevents the revival of an action previously barred, by any new promise whatever, whether verbal or in writing. In conjunction with these should be taken into consideration the 3d section of the repealing act (*R. S.*, 697), which provides that, when the limitation shall have begun to run, "and the same, or any similar limitation, is prescribed in the Revised Statutes, the time of limitation shall continue to run, and shall have the like effect, as if the whole period had begun and ended under the operation of the Revised Statutes." Taking these provisions thus far together, there would seem to be a conflict, especially between this last provision and the 27th section, above quoted. But there is another material section not yet quoted—the 24th—which is in these words: "None of the provisions of this chapter, respecting the acknowledgment of debt, or new promise to pay it, shall apply to any such acknowledgment or promise, made before the provisions of this chapter shall take effect as law; but every such last mentioned acknowledgment or promise, although not made in writing, shall have the same effect as if no provision relating thereto had been herein contained." *R. S.*, 579. This section seems to me to be a key to the whole, and to show that it was the intention of the legislature in all these provisions, and that such is their true construction, that where causes of action had been barred by previously existing statutes, they should not be revived by their repeal, or a change in the Revised Statutes of the period of limitation; that, as to the period of limitation, they should be governed by the previously existing laws; and that, by the 13th and 24th sections, a new rule of evidence is furnished as to a new promise, which should prevent the

*Joy v. Thompson.*

operation of the statute in reference to previous contracts, whether continuing or already barred, by which such contracts must be evidenced in writing, signed by the party to be charged. If this is not the correct construction in this particular, then certainly there would be great reason for the position that the 25th section prevents the renewal of a cause of action, already barred, in any manner whatever ; for, otherwise, the incongruous result would follow. that a cause of action upon which the statute had partly run, could be subsequently kept alive only by a promise in writing, while the older one, already barred, could be revived by a verbal one. And yet I cannot conclude that the legislature intended to give so extensive an operation to the 25th section. For, by the general law, a new promise or agreement to pay the old debt barred by the statute, constitutes a new contract, of which the old debt and the moral obligation to pay it, when not paid, make the consideration ; and it could not have been intended to prevent such new contract. To require that it, as well as any promise to continue an existing cause of action beyond the statutory period, should be in writing, appears to be what they designed.

The act of March 6th, 1843 (*S. L.* 1843, p. 43), which has been alluded to, has not, that I can perceive, any distinct bearing on the question. Its provisions are not stronger than that of the 27th chapter under consideration. The third section, mentioned in it, of the act to repeal the acts consolidated in the Revised Statutes, refers only to causes of action upon which the statute had commenced running and had not fully run ; and the chapter first mentioned in it, is that which prescribes the limitation of actions in respect to real estate. Its language in one particular varies materially from that of the Revised Statutes ; and this, with the history of the statutes of limitations, will show more fully its intent. It provides that the sec-

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Joy v. Thompson.

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tions referred to shall be so construed, that causes of action existing anterior to the Revised Statutes, "shall be governed and determined by the several statutes of limitations *theretofore in force applicable thereto.*" The 8th section of chapter 1, as well as the 27th section of chapter 2, provided that they should be governed by the law "under which the right of action accrued." The first statute of limitations was passed May 15th, 1820, and was prospective, embracing only future rights of action. This is the same found in the statutes of 1827 and 1833, and continued without change until the revision of 1838, except as directly mentioned. On November 5th, 1829, the legislative council passed an act, that real and possessory actions, for causes then existing, should be brought in ten years from that period, or be barred; and personal actions, for causes which accrued prior to May 16th, 1820 (when the general statute came into effect), in four years from that period. These were manifestly to quiet all claims and demands prior to the limitation act of May, 1820, as well as to abridge the period for enforcing then existing claims to real estate, and thus to insure repose in regard to both. By the Revised Statutes, this act was repealed by its title; and, by a literal construction of the language in the chapter referred to, "the law under which the right of action accrued," the causes of action anterior to May 16th 1820, would be excluded, as well as all the others embraced in the act of November 5th, 1829; and thus a class of stale claims revived in respect to real estate, which, by the general scope and objects of the statute, were not designed to be revived.

The language of the declaratory act, "the several statutes of limitations in this state theretofore in force in this state, applicable to," etc., would save this consequence. And such appears to me on the face of it to be its intent, as well as to remove the ambiguity created by the 3d sec-

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*Joy v. Thompson.*

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tion of the act to repeal the acts revised and consolidated in the Revised Statutes, in reference to the period of limitation, where the pre-existing statute had partly and not entirely run, when the Revised Statutes took effect.

But it is insisted that the statute, thus construed, impairs the obligation of contracts; and the case of *Bronson v. Kinzie*, 1 *Howard U. S. R.*, 311, is relied on to show that it cannot constitutionally have this effect. Being, as I have stated, but a new and prospective rule of evidence, I cannot perceive how that case, or the constitutional provision urged, is applicable. When the Revised Statutes took effect, this note, being barred, had no legal obligation. The legal remedy was gone; and, if any obligation remained, it was only *in foro conscientiae*. It could only thereafter have legal force and effect by a new contract or promise, of which it might be the consideration. Thus only could any legal obligation be revived in respect to it. The legislature, then, only provided that this new future contract, or promise, should be evidenced by writing, as in several cases of contracts embraced in the statute of frauds. No existing legal right is affected, or legal obligation impaired. We are, then, of opinion that the judgment below should be affirmed, and that it should so be certified to the Circuit Court for the county of Wayne.

*Judgment affirmed.*

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Jones v. Palmer.

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**Jones v. Palmer.**

On demurrer to a declaration upon a contract made in the state of New York, and specifying no particular place of performance. *Held*, that the court would not take judicial cognizance of a law of New York, which, applied to the contract, would render it void; but that the defendant, in order to avail himself of such law, must, upon a proper issue, prove it as a fact to the court; and that, until this was done, the court would test the validity of the contract by the laws of this state. (a)

A, being indebted to B, transferred to him, in part payment of such indebtedness, the note of C, and indorsed on the back thereof a written guaranty of its payment. *Held*, that the guaranty was an original undertaking, founded upon a new and sufficient consideration, and therefore not within the statute of frauds. (b)

*Held*, Also, that it was not essential to the validity of the guaranty that the consideration should be expressed therein; but that the same might be proved by parol; and this, notwithstanding the guaranty was expressed to be "for value received."

Case certified from Eaton Circuit Court, by the Hon. CHAS. W. WHIPPLE, presiding judge. This was an action of *assumpsit* upon the defendant's guaranty of payment of a promissory note for \$300, made by C. B. Dunbar, December 10, 1836, payable to the defendant or bearer, two years from the first day of May (then) next. The declaration alleged, that, on the 16th day of January, 1837, at Varysburgh, in the county of Genesee, in the state of New York, the defendant was indebted to the plaintiff in the sum of \$600, and in consideration of such indebtedness, and that the plaintiff at the special instance and request of the defendant, would receive in payment, upon his said debt of \$600, the said promissory note, to the amount of \$300, did then and there guaranty the payment of said note, in writing on the back thereof, in the words following to wit, "For value received I do hereby guaranty the payment of the within note to Henry

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(a) Principle affirmed: High, appellant, 2 Doug., 515; Crane v. Hardy, 1 Mich., 57. But there is no presumption that the statutes of other states are the same as ours, Kermott v. Ayer, 11 Mich., 181; People v. Lambert, 5 Mich., 363; Ellis v. Maxon, 19 Mich., 186; or that a transaction valid under our laws is invalid elsewhere: Worthington v. Hanna, 23 Mich., 535.

(b) See Tinker v. McCauley, 3 Mich., 192.

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Jones v. Palmer.

Jones or bearer. *Varysburgh*, Jan. 16, 1837. C. S. PALMER." To this declaration there was a general demurrer.

*Farrand & Higby*, in support of the demurrer.

*James W. Gordon and J. W. Burchard, contra.*

FELCH, J., delivered the opinion of the court.

The questions raised by the demurrer in this case are:

1. Is the agreement contained in the guaranty within the statute of frauds?
2. Is the consideration sufficiently expressed therein?

Preliminary to the determination of these questions, it becomes necessary to inquire by what law the validity of the instrument, as affected by the statute of frauds, is governed. The defendant claims that it is the law of New York. From the declaration it appears that the guaranty set forth was made, and the consideration for it was received in New York, and that no particular place of performance was specified. No principle is better settled than that the *lex loci contractus* governs in such a case, as to the validity of the contract. If not valid in New York, it would not be enforced here: *Sherill v. Hopkins*, 1 Cow., 103; *Story's Conf. Laws*, 223, 263. But, in order to avail himself of this invalidity, it is necessary that the defendant should prove to the court the law of New York, which rendered the contract invalid; and until this is proved, the court will test the validity of the instrument by the *lex fori*, the law of Michigan: *Sherill v. Hopkins*, 1 Cow., 103; *Thomas v. Robinson*, 3 Wend., 267; *Holmes v. Broughton*, 10 Wend., 75; *Lincoln v. Batelle*, 6 Wend., 475; *Frances v. Ocean Insurance Co.*, 6 Cow., 429; *Story's Conf. Laws*, 257, and cases above cited. The demurrer to the declaration admits the contract to have been made in New York, but the law of that state which, it is alleged, affects its validity, not being set forth in the declar-

Jones v. Palmer.

ation, is not admitted; neither can it, under the demur-  
rer, be a subject of proof before the court. If the defendant  
had intended to rely upon a supposed invalidity of the  
contract, depending upon some law of New York, instead  
of demurring, he should have pleaded to the declaration,  
and thus have placed himself in a position to have given  
evidence of it on a trial before a court and jury. Although  
we are aware that the law of New York differs from our  
own, in respect to the consideration required to be expressed  
in an agreement to answer for the debt or default of  
another, yet, under the pleadings in this case, its provisions  
cannot be regarded in the decision.

Is the contract declared upon within the statute of  
frauds? If so, it comes within the description used in  
that statute, of a "special promise to answer for the debt,  
default, or miscarriage of another person." The promis-  
sory note, on which the defendant's guaranty is indorsed,  
is the debt of C. B. Dunbar, the maker. The guaranty is  
an undertaking to pay it if the maker does not. If nothing  
further were disclosed in the declaration, it might well be  
deemed an undertaking to pay the debt of Dunbar. But  
the declaration alleges that the defendant was indebted  
to the plaintiff, and, to satisfy such indebtedness *pro tanto*,  
transferred to him the note of Dunbar, his own debtor, and  
promised to guaranty its payment. The consideration for  
such promise was the discharge by the plaintiff of a por-  
tion of the defendant's indebtedness to him. It was in  
fact a promise by the defendant to pay his own debt, and  
not the debt of another. The transaction gave to the  
plaintiff the additional security of the liability of the  
maker of the note, but he still retained the undertaking of  
the defendant to pay the debt, if the maker failed to do  
so. Suppose such failure had happened, and the defendant  
is made to pay; he would do nothing more than to pay  
his own debt to his original creditor. It would not be a

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Jones v. Palmer.

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payment for the maker of the note, nor would it in any manner affect his liability thereon. Suppose, instead of transferring the note to the plaintiff with the guaranty thereon, the defendant had delivered to him certain personal property, with power to sell the same, and apply the proceeds towards the payment of the amount due him; and had at the same time given a written guaranty that the property should command the amount, by sale in six months, or, if not, that he would pay the same. This would be an original undertaking by the promisor to pay his own debt to his creditor, if the money was not obtained for the property. Yet it is difficult to see how such a case differs essentially from the one before us. In the present case, the security was the note, but the promise of the defendant was to pay the amount due from him to his creditor, if it was not received on the note when it became due. In *Leonard v. Vredenburgh*, 8 Johns., 29, the court say, that "if the promise to pay the debt of another be founded on a new and distinct consideration, independent of the debt, and moving between the parties to the new promise, it is not a case within the statute. It is considered in the light of a new promise." See also *Skelton v. Brewster*, 8 Johns., 376; *Myers v. Morse*, 15 Id., 425; *Gold v. Phillips*, 10 Id., 412; *Slingerland v. Morse*, 7 Id., 463; *Farley v. Cleveland*, 4 Cow., 432. In *Chitty on Bills*, 274, in treating upon the subject of guaranties, it is stated that, when the party himself is benefited by the transfer, it should seem that even his verbal promise would be valid; but when the engagement would be collateral, and within the meaning of the statute against frauds, it must be in writing: *Dewolf v. Rabaud*, 1 Pet., 476; *Townley v. Sumrall*, 2 Pet., 182; *Dearborn v. Park*, 5 *Greenl.*, 81; 1 *Saund.*, 211, n. 2. All these cases recognize the doctrine that, when the promise is made upon some new consideration sufficient in law to

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Jones v. Palmer.

support it, though it be in effect to answer for another person, it is considered an original promise, and not within the statute of frauds. The case made by the declaration is clearly of that character.

The guaranty not being within the statute of frauds, it only remains to inquire whether the consideration is sufficiently expressed therein to sustain the plaintiff's declaration. The guaranty is expressed to be "for value received," without stating what was the value received, which constituted the consideration of the undertaking. The declaration sets forth specifically what was the consideration. It shows a good cause of action, unless some rule of law forbids parol evidence of the consideration of a written promise. The case of *Wain v. Walters*, 5 *East.*, 10, decided that the consideration must be expressed in a written agreement or promise coming within the statute of frauds. This, and the subsequent decisions to the same effect, go upon the ground merely that the statute of frauds required that the consideration should be stated in the agreement; and they impliedly admit, that, as to agreements not coming within the purview of the statute, the rule would be otherwise: *Leonard v. Vredenburgh*, before cited, expressly decides the point, and, in *Dewolff v. Rabaud*, 1 *Pet.*, 476, is referred to by the Supreme Court of the United States, as settling the question in New York; the court adding, that it seems to be a reasonable doctrine, founded in good sense and convenience, and tending rather to suppress than encourage fraud: *Nelson v. Dubois*, 13 *Johns.*, 175; *Bailey v. Freeman*, 11 *Johns.*, 221; *Wheelwright v. Moore*, 1 *Hall's S. C. R.*, 201. The words "value received," contained in the guaranty, cannot have the effect to exclude extraneous proof of the consideration. Such proof does not contradict or vary the import of these words in the instrument. It merely shows in what the value consisted. I am not aware of

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Wight v. Warner.

any rule of law which excludes such evidence, and the authorities above cited show clearly that it is admissible.

The declaration is sufficient, and the demurrer should be overruled; and it must be so certified to the Circuit Court.

*Demurrer overruled.*

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**Wight v. Warner and another.**

Inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority conferred upon them. (a)

The facts necessary to give them jurisdiction must appear affirmatively in their proceedings, and cannot be presumed; but jurisdiction being acquired, it will be presumed to have been rightfully exercised, unless the contrary appears by error affirmatively shown. (a)

The return of a justice of the peace to a *certiorari* showed that the suit was commenced by writ of attachment, but it did not appear therefrom that any affidavit was filed, or any bond executed, as required by the statute, before the writ was issued. Held, that these facts could not be presumed, as they were necessary to give the justice jurisdiction in the case, and that the judgment of the justice for the plaintiff must, therefore, be reversed. (b)

Where a writ of error brings before this court the record of the Circuit Court, in a case brought before that court by *certiorari* to a justice of the peace, this court has no power to require a further return of the justice to the *certiorari*.

Error to Wayne Circuit Court. This suit was originally brought by Wight, against Warner and another, before a justice of the peace, who rendered judgment for the plaintiff, which was reversed by the Circuit Court on the removal of the cause to that court by *certiorari*. As appeared by the return of the justice to the *certiorari*, the suit was commenced by attachment, issued on the 13th,

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(a) Principle affirmed and applied in *Clark v. Holmes*, post, 390; *Spear v. Carter*, 1 Mich., 19; *Wilson v. Davis*, *Ibid.*, 156; *Shadbolt v. Bronson*, *Ibid.*, 86; *Chandler v. Nash*, 5 Mich., 409; *Elliott v. Dudley*, 8 Mich., 62; *Platt v. Stewart*, 10 Mich., 260; *Bush v. Dunham*, 4 Mich., 339; *Bryan v. Smith*, 10 Mich., 229; *Merrill v. Montgomery*, 25 Mich., 74; *Weimar v. Bunbury*, 30 Mich., 201, 219; *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441. See *Wall v. Trumbull*, 16 Mich., 293, 225, 249; *Palmer v. Oakley*, 2 Doug., 423.

(b) See *Goodrich v. Burdick*, 26 Mich., 39.

*Wight v. Warner.*

and returnable on the 20th of August, 1841, by virtue of which a barn, the property of the defendant Warner, was seized, and the defendants were summoned to answer the plaintiff in a plea of debt. It did not appear from the return whether any bond was executed, or any affidavit was filed, as required by the statute (*S. L.* 1841, p. 85, § 18, p. 83, § 12), before the attachment was issued. None were returned, nor was the attachment, or the return thereto showing the manner of its service, set forth. But the return of the justice stated that, on the return day of the writ, the defendants appeared before him and moved to dismiss the proceedings for want of jurisdiction and for irregularity, and objected: 1. That no affidavit was filed authorizing the attachment; the affidavit having been subscribed by the plaintiff, and he having sworn that it contained the truth, the whole truth, and nothing but the truth, but the justice not having at the time signed the jurat. 2. That the affidavit was not in compliance with the statute. 3. That the attachment had not, as appeared by the return thereto, been served in the manner provided by the statute. 4. That the statute only authorized proceedings against garnishees. The justice overruled the motion, and the defendants now contend that the decision of the justice was erroneous, and that the judgment of the Circuit Court ought not, therefore, to be reversed, and that of the justice affirmed, as claimed by the plaintiff.

*H. H. Emmons*, for the plaintiff.

*Van Dyke & Harrington*, for the defendants.

GOODWIN, J., delivered the opinion of the court.

By the justice's act of 1841, it was necessary that an affidavit should be filed, prior to the issuing an attachment, showing a case within its provisions, and also a

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Wight v. Warner.

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bond (*S. L.* 1841, *p.* 83, § 12, *p.* 85, § 18); and such was the case under the provisions of the Revised Statutes.

All we find in the return in regard to the affidavit, is what is stated in the defendants' motion making the objections that no jurat was signed, and that the contents of the affidavit were insufficient. It is insisted by the counsel for the defendants, that all the facts necessary to give the justice jurisdiction, must appear affirmatively from his return in order to sustain the proceedings. The plaintiff, on the other hand, contends that error must appear affirmatively, and that the court will presume all right in favor of the judgment, unless the contrary be shown.

In *Jones et al. v. Reed*, 1 *Johns. Cas.*, 20, it is laid down, that, "It is a clear and salutary principle, that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority given them. They can take nothing by implication, but must show the power expressly given them in every instance. The sound rule of construction in respect to the courts of justices of the peace, is to be liberal in reviewing their proceedings as far as respects regularity and form, and strict in holding them to the exact limits of jurisdiction prescribed by the statute." See, also, 1 *Caine*, 593, 594. The principle first above stated is that which is generally applied to the construction of statutes conferring special powers, and is found in all the cases of this class in the books. The latter is the general rule applied in reviewing the proceedings of special inferior jurisdictions, and especially of justices of the peace in civil as well as criminal cases. When the facts upon which they assume to exercise jurisdiction are given, the rule as to holding them strictly within the limits of the power expressly conferred, is strictly applied. The only question is whether, when these facts are not fully given, they are to be presumed,

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Wight v. Warner.

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and the court, in reviewing their proceedings is to intend that those existed necessary to give them jurisdiction, until the contrary be affirmatively shown, as, in this case, that there was a regular affidavit, showing a case for an attachment within the statute, and a bond. As to this, it appears to be the general rule applicable to all inferior jurisdictions acting summarily, and not according to the course of the common law, that their jurisdiction must affirmatively appear; that, in the absence of the facts necessary to give them jurisdiction, they cannot be presumed, and that, when they have, by a compliance with the provisions of the statute, acquired jurisdiction, then their proceedings subsequently are to be construed liberally in respect to regularity and form, and error not to be presumed unless made affirmatively to appear.

In *Powers v. The People*, 4 Johns., 292, upon certiorari to a court of special sessions, the court, in giving their opinion, say: "The principal objection, is, that the record does not show sufficient to give the justices jurisdiction." And in conclusion: "It is a salutary rule with respect to inferior courts, that the cause of which they take cognizance should appear to be within their jurisdiction." The conviction was quashed on two objections of this character. See also, *The People v. Miller*, 14 Johns., 371.

Suppose an action of trespass against the justice and plaintiff in the attachment in this case, and the defendants should set up a justification by plea or notice, and no more should appear therein than appears on the return in this case; would the justification be good? Or, on the contrary, would they not be held trespassers notwithstanding? I think the latter. Suppose a sale of the property to the plaintiff, and in an action in which the title should come in question, these proceedings were set up by the plaintiff as its foundation, and no more should be shown than appears on this return. Would the title be supported? Or,

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*Wight v. Warner.*

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would not, on the contrary, the proceedings be held wholly void, and the title wholly unsupported? I think the latter. See *Vosburgh v. Welch*, 11 Johns., 175; *Adkins v. Brewer et al.*, 3 Cow., 206; both actions of trespass in cases of attachment issued by justices.

In *Morse v. James, Willes*, 122, 128, which was an action of trespass, and justification under process of an inferior court, on demurrer to the plea, Chief Justice Willes remarks: "Nothing is to be presumed in favor of an inferior limited jurisdiction, but what is particularly set forth." And Johnson, J., in *Shivers v. Willson*, 5 Harr. & Johns., 130, observed that, "No principle of law is more evident, than that when a limited jurisdiction has a course prescribed by statute, that must be pursued, and so appear on the face of the proceedings." In *Thatcher v. Powell*, 5 Pet. Cond., 28, 6 Wheat., 128, Chief Justice Marshall, in delivering the opinion of the court, says: "In summary proceedings where the court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed; and those facts, especially, which give jurisdiction, ought to appear in order to show that its proceedings are *coram judice*." In 6 Wend., 566, Chief Justice Savage, in speaking of the *certiorari* at common law to review the proceedings of inferior jurisdictions, after stating that in such cases, independent of statutory provisions, it does not extend to an examination of their decisions on questions of fact, says: "It may be, and indeed is necessary for them in their returns to state such facts as are necessary to show their jurisdiction." And again: "In pleading, so much of the proceedings of all inferior jurisdictions must be stated, as will show their jurisdiction; so in making a record of them, which must contain a true history of the proceedings of the court or tribunal itself, it should be shown that it acted in a case

*Wight v. Warner.*

where it had jurisdiction." In this case, if a record were made of the proceedings before the justice, the affidavit, which was the foundation of the whole, would appear in it.

I fully recognize the principle insisted upon by the plaintiff's counsel, that *error* must appear affirmatively from the facts in the return, and we have had frequent occasions to refer to and apply it. As to all matters which are *error*, strictly speaking, the principle applies and should be strictly adhered to. But I apprehend there is a very material distinction between what are *errors*, merely, and what are defects of jurisdiction. What is necessary to give jurisdiction must fully appear; when that is acquired, it will be presumed to have been rightly exercised, unless the contrary appear by error affirmatively shown.

All the cases cited from the New York reports by the plaintiff's counsel upon this point, are cases where no question of jurisdiction arose, but the errors alleged were in the subsequent proceedings, jurisdiction having been fully acquired; and they do not conflict with the other cases from the same state where the principle as above stated in reference to jurisdiction, seems to be manifestly recognized.

In this case no affidavit was returned; and it does not appear from the justice's return that there was one; and if we take the motion to quash the attachment as it stands in the return, it appears from it, that there was a paper signed by the party and sworn to, but the jurat not signed, and its contents, as alleged, not sufficient to warrant the attachment. Nor does it appear that any such bond was given as is required by the statute as a prerequisite to the attachment. It seems to me, therefore, that for the reasons above stated, the judgment of the Circuit Court reversing that of the justice, must be affirmed.

If the *certiorari* had issued from this court to the justice, we might, in support of the judgment and of justice, yet

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Clark v. Holmes.

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require a further return under our general powers ; but this is a writ of error to the Circuit Court, and we act on the record from that court only ; and, though that court might have so done, yet, as the case comes to us, it is beyond our powers.

It was said that if the return was imperfect, the party who brought the *certiorari* might have procured a further return to show the defects or errors, if any. But he was at liberty to rely upon it as it was ; and it was equally in the power of the party who obtained the judgment, to procure, with the aid of the court below, a return of the proceedings, if they existed, which would show the jurisdiction, and go to support the judgment.

*Judgment affirmed.*

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#### Elijah Clark v. Orman Holmes.

Inferior courts of special and limited jurisdiction, are confined strictly to the powers conferred upon them, and their proceedings must appear to be within those powers. (a)

When proceeding to exercise their powers, they must have jurisdiction of the person, by means of the proper process or appearance of the party, as well as of the subject matter of the suit; and where they have not such jurisdiction, their proceedings are absolutely void, and cannot afford any justification or protection, and they become trespassers by any act done to enforce them. (a)

C. & L. were duly summoned to answer to M. before a justice of the peace, at his residence. They appeared there on the return day; but neither the justice, who was absent from home, nor M. appeared; and no proceedings were had in the cause. Three days afterwards L., in the presence of C., and of a witness, but in the absence of the justice, indorsed on a joint and several note of C. & L., found in the office of the justice, his individual confession of judgment thereon, upon which the justice, on the same day, without any continuance of the cause from the return day of the summons, or any declaration filed, rendered judgment in favor of M., against C. & L., for the amount of the note. Execution was afterwards issued thereon, by virtue of which the property of C. was seized and sold. Whereupon, C. having

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(a) *Wight v. Warner, ante*, p. 384, and the cases cited in note (a) thereto, affirm and apply in various ways these principles. That a judgment void for want of jurisdiction affords no protection, see especially *Shadbolt v. Bronson*, 1 Mich., 85; *Weimar v. Bunbury*, 30 Mich., 201. See also *Wall v. Trumbull*, 16 Mich., 298, 325, 328, 345, 350.

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Clark v. Holmes.

brought trespass against the justice, it was held, that, at the time when the judgment was rendered, the justice had no jurisdiction over the person of C., the summons having spent its force on the return day, and the parties being out of court, and the cause discontinued; and that he was liable to C. in the action.

Where a court has jurisdiction, its proceedings cannot be impeached collaterally; nor, when of record, can there be any proof in opposition to the record.

*Sembler*, that this rule applies to the proceedings of a justice of the peace, and to the docket of them which the statute requires of him to keep.

But the rule does not apply to facts relating to jurisdiction; and the jurisdiction of special inferior tribunals, at least, over the person, as well as the subject matter, may be inquired into; and the want of jurisdiction may be shown by evidence, even when it tends to contradict the minutes or docket which those tribunals are required to keep as records of their proceedings.

Case certified from Livingston Circuit Court. This cause was tried at the November term, 1841, of the Circuit Court, before the Hon. C. W. WHIPPLE, presiding judge. The action was trespass *de bonis asportatis*. Plea, general issue. It appeared on the trial that the plaintiff and one Daniel Lane were duly served with a summons, at the suit of one Sanford Murray, to appear before the defendant, who was a justice of the peace, at his residence, on the 9th of November, 1839. They appeared according to the mandate of the summons, and Lane remained at the house of the defendant for over two hours. But Murray did not appear; neither did the defendant, who was absent from home; and no proceedings in the cause were had, therefore, on that day. No declaration was ever filed in the case. Afterwards, at the house of the defendant, but in his absence, Lane indorsed on the back of a note found there, made by himself and the plaintiff, jointly and severally, due October 1, 1839, and payable to Elisha Haines or bearer, for \$39, the following confession of judgment: "I hereby confess judgment on the within note for thirty-nine dollars. Nov. 12, 1839." (Signed) "DANIEL LANE." A person was called as a witness to this

*Clark v. Holmes.*

confession, but he did not attest it. The plaintiff was present, and, as the witness first stated, advised Lane to make the confession; but on his cross-examination, he stated that he was not sure as to that. On the 12th of November, the defendant rendered a judgment upon the note, the entry of which on his docket, read in evidence, was as follows

*"Sanford Murray v. Daniel Lane and Elijah Clark:*

"Summons issued Nov. 2, 1839, returnable Nov. 9th, at 1 o'clock P. M. Defendants appeared. Daniel Lane confessed judgment on a note for \$39, in favor of plaintiff.

"Judgment rendered Nov. 12, 1839. Damages, \$39.00

Const. fees, W. E. H., 1.20

Justice's fees, .72

"J. G. HORTON, Witness."

Upon this judgment execution was afterwards issued by the defendant, and delivered to a constable, who, by virtue thereof, levied upon certain cattle, the property of the plaintiff in this suit, proved to be worth from \$30 to \$37, and sold the same at public auction.

On the trial, the parol evidence of the absence of the defendant on the return day of the summons, was objected to by the defendant, the docket having been first introduced by the plaintiff, and was at first rejected by the court; but after the defendant had gone into his defense, and proved the note and confession thereon indorsed, it was again offered and admitted.

A judgment for the plaintiff for the value of the property seized and sold on the execution, was entered by consent of the parties, subject to the opinion of this court as to the right of the plaintiff to recover upon the facts in the case.

*O. Hawkins*, for the plaintiff.

*E. Mundy*, for the defendant.

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Clark v. Holmes.

GOODWIN, J., delivered the opinion of the court.

On the part of the plaintiff, it is insisted that the defendant, the justice, acted without jurisdiction; that the judgment was void, and the defendant a trespasser. On the part of the defendant, it is contended that he had jurisdiction, and if he erred in rendering the judgment, it did not render the proceedings void, but was an error in judgment for which the remedy was by a reversal of the judgment in a superior court; and further, that facts *al iunde* the docket, were not admissible to show a want of jurisdiction.

*First.* Upon all the facts as presented, is the plaintiff entitled to recover?

It is a rule which we had occasion to advert to in the case of *Wight v. Warner and another* (*ante*, p. 384), that inferior courts of special and limited jurisdiction are confined strictly to the powers conferred upon them, and that their proceedings must appear to be within those powers.

It is a well settled doctrine that, when proceeding to exercise the powers conferred, they must have jurisdiction of the person, by means of the proper process or appearance of the party, as well as of the subject matter of the suit; and when they thus have jurisdiction of the person and the cause, if in the further proceedings they commit error, the proceedings are not void, but only voidable, and may be reversed for error by the proper court of review where a power of review is given; and further, that in such case they are not subjected to any personal liability, but are entitled to the same immunity in regard to errors of judgment, as are the judges of superior courts; but on the contrary, when they have not such jurisdiction of the cause and of the person, their proceedings are absolutely void, and cannot afford any justification or protection, and they became trespassers by any act done to enforce them. This principle is sustained by various authorities

*Clark v. Holmes.*

and cannot now be contradicted: *Perkin v. Proctor*, 2 Wills., 382; *Morse v. James, Willes*, 122, 128; *Miller v. Sears and others*, 2 W. Bl., 1145, a leading case where the principles are clearly stated, and the line of distinction between judgments of superior courts, and those of special and limited jurisdiction, is precisely drawn: 2 *Strange*, 711, 993; *Wise v. Withers*, 1 Pet. Cond., 552; *Kempe's Lessee v. Kennedy*, 2 Id., 223; *Elliott et al. v. Piersol et al.*, 1 Pet., 328, 340; *Hubbard v. Spencer*, 15 Johns., 244; *Adkins v. Brewer*, 3 Cow., 206; *Bigelow v. Stearnes*, 19 Johns., 39; *Reynolds v. Orvis*. 7 Cow., 269.

In *Bigelow v. Stearnes*, the doctrine is very clearly and forcibly stated by Chief Justice Spencer. He says: "I consider it perfectly well settled, that to justify an inferior magistrate in committing a person, he must have jurisdiction, not only of the subject matter of the complaint, but also of the process and the person of the defendant." And, after citing several authorities, he adds: "If a court of limited jurisdiction issues a process which is illegal, and not merely erroneous; or if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause, without having gained jurisdiction of the person, by having him before them, in the manner required by law, the proceedings are void; and in the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such a case, becomes a trespasser."

In this case, at the time of the rendition of this judgment, had the justice jurisdiction of the person of Clark, the plaintiff in this action, so as to authorize him to adjudicate at all in respect to him? The summons which had been issued, was returnable on the 9th November. On that day he and the other party sued appeared at the justice's house, the place of return. The justice was not

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Clark v. Holmes.

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there; nor did he appear there at all, though one of the parties sued remained there two hours or more. Nor did the plaintiff at all appear. Lane, the co-defendant there sued, indorses on a note found there the above mentioned confession, in the presence of a witness. Clark is present; but the confession signed is that of Lane only. There is no cause of action alleged, by declaration or otherwise, against the parties appearing; for there is no plaintiff to allege any, and no justice to receive any. And there is no continuance or adjournment of the cause to any subsequent day. Three days after, on the 12th, the justice rendered judgment in favor of Murray against not only Lane, the party who made the confession, but also Clark, the other party sued, the plaintiff in this action. After the 9th there was no cause in court pending before him. It had become discontinued—not merely a technical discontinuance by reason of the justice erroneously continuing the cause over to another day—but, both in law and fact, the parties were out of court; and the justice might as well have proceeded in that case three weeks, or three months, or even three years after. He had lost jurisdiction of the parties. The summons had its full effect on the 9th, and the parties were not retained in the court by any proceeding whatever. The effect of the confession in respect to Lane it is unnecessary to consider.

Several cases have been cited to show that when the justice had acquired jurisdiction, and by his subsequent proceedings the cause was discontinued, and he afterwards proceeded to judgment, it were mere *error* and ground of reversal of judgment, and the proceedings were not void; but on examination they will be found to have been cases where he had improperly continued over the cause to a subsequent day. In those cases the Supreme Court of New York held that the error worked a discontinuance, and therefore reversed the judgments. They were not

*Clark v. Holmes.*

cases where the parties were actually out of court, and no further day given them. In the case cited from 7 *Wend.*, 200, *Horton v. Auchmoody*, which seems to have been the first case where an attempt was made to hold the justice a trespasser for such a cause, the previous cases of this class are collected. They appear to have been all upon *certiorari*. In that case the justice had granted an adjournment, on the application of the plaintiff, to a subsequent day, and the defendant then not appearing, he had gone on and rendered a judgment for the plaintiff. It was held that the justice having jurisdiction of the cause, the parties, *and the question of adjournment*, his proceedings were erroneous merely, and liable to reversal, but not *coram non judice*. In the case before us, there was no adjournment, and no cause in court after the 9th. In *Hunt v. Wickwire*, 10 *Wend.*, 102, the same principle is recognized, and in that case, under the facts presented, the judgment was held good. In *Ingalls v. Sprague*, 10 *Wend.*, 672, two defendants were sued in a justice's court, and one of them appeared for them both and confessed judgment for both, representing that he had authority to do so from his co-defendant, and, upon execution, the property of the co-defendant was levied. In an action of trespass by the latter against the former, it was held that the judgment and execution were a justification; the judgment being rendered on an appearance of both parties, the one for the other, and the defect of proof of authority, if that were defective, being regarded as matter of error subject to review by *certiorari*. Here the ground of the decision was, that the court had jurisdiction by the appearance of the parties, the one by attorney, and thus the confession was of both. The case of *Hubbard v. Spencer*, 15 *Johns.*, 244, is a case strongly in point for the plaintiff in this case. It was an action of debt on a judgment rendered against the defendant under the following circumstances: The

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Clark v. Holmes.

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cause had been adjourned, and at the adjourned day neither party appeared. More than a month afterwards, a person who had been authorized by the defendant to appear for him at the adjourned day and confess judgment, came before the justice and testified to these facts, and that he thought his authority to confess the judgment extended to that time; and the justice rendered the judgment as of the day to which the cause was adjourned. Platt, J., in giving the opinion of the court, says: The justice "had no jurisdiction when he received the plea of confession, and therefore his judgment, *nunc pro tunc*, was void. The justice was limited by statute to a certain course of proceeding; and it would be preposterous to give such a construction to the statute as would authorize what was done in this instance. It must be therefore regarded a proceeding *coram non judice*." This is in conformity to the principles above stated, and well illustrates them.

2. But it is alleged that the justice's docket was conclusive, and it was not competent for the plaintiff to give evidence of facts *aliunde*, to show a want of jurisdiction, or, as alleged, to impeach the record. Does the docket itself show enough to give jurisdiction? It shows that the defendants appeared, and, therefore, by inference, that the justice was present, as a personal knowledge of that fact seems implied; but it does not show any appearance of the plaintiff, or any cause of action alleged by him, nor any continuance to a subsequent day; and the confession is only the confession of Lane, and not of Clark, whose property was taken. There is not enough on the docket to show jurisdiction. The first evidence *aliunde* on this point was by the defendant, of the note and confession on it, to show the cause of action to have been joint, and the confession to have been of that cause of action, and with the approbation of Clark. Afterwards the plaintiff was admitted to show the other facts in opposition.

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Clark v. Holmes.

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Now, if it was competent to prove facts on the part of the defendant to sustain the jurisdiction, it was certainly competent to prove the other facts, which were part and parcel of the same, to exclude it.

But is the position itself a sound one? Where there is jurisdiction, the proceedings cannot be impeached collateral, nor, when of record, can there be any averment or proof in opposition to the record; and the docket of his proceedings, which the statute requires a justice to keep, would doubtless come under the same rule. But does the principle apply to facts relating to jurisdiction? The two principal cases relied on in behalf of the defendant are *Mather v. Hood*, 8 Johns., 51, and *Cunningham v. Bucklin*, 8 Cow., 178.

The former was a conviction under the forcible entry and detainer act of New York, similar to that of England, authorizing the justice to convict of the force, etc., upon his own view. The record was regular, in conformity to the statute, and to established precedent. In an action of trespass against the justice, it was sought to impeach it by showing that there was no force. The court decided that this was a matter within his jurisdiction so to try, and the record of his judgment being regular, was conclusive. It was not there a question of jurisdiction. In *Bigelow v. Stearnes*, 19 Johns., 39, cited above, Spencer, C. J., in delivering the opinion of the court, says, "that the conviction given in evidence by the defendant, was a complete protection to him, as to every thing set forth in it, unless it was shown that the defendant had either exceeded his jurisdiction, or had not jurisdiction of the person of the plaintiff." And, referring to the case of *Mather v. Hood*, he says: "It was not decided in that case, nor is there any case that sanctions the doctrine, that by force of a conviction before a magistrate, the party affected by it may not show, even in a collateral action, where the conviction is set up as a

## Clark v. Holmes.

defense or comes in question, that the magistrate had not jurisdiction of the person against whom the conviction operates." He says, and we say with him, "Take the case of a person convicted by a justice of the peace, who never had been summoned, and who never appeared; would it admit of a doubt that this fact might be shown, and if proved, that the whole proceeding would be *coram non judice* and void?" Of course he means where there was no summons or process, or no return of any officer showing a service. Of course such a return of the proper officer would give jurisdiction, and it would not be competent to impeach it. And this is the point of the case in 3 *Wend.*, 202. In the case of *Cunningham v. Bucklin*, the court comment upon the case of *Mather v. Hood*, and quote the language of the decision in the case of *Bigelow v. Stearnes* with approbation, and then say, "There is no question here" (in the case then under consideration) "of jurisdiction. The commissioner had by statute jurisdiction of the subject matter. By the petition, etc., he acquired jurisdiction of his person. The subsequent proceedings, if irregular, are voidable merely, and not void." "They may be reversed by *certiorari*; but while they remain matter of record and conclusive evidence (and this was the effect given them by statute), the facts stated in the charge cannot be controverted." It is evident then, that this case does not reach the question when the evidence offered goes to the jurisdiction.

The case of *Bigelow v. Stearnes*, is a strong one to show that in such cases it is admissible; and to this effect is the case of *Borden v. Fitch*, 15 *Johns.*, 121, there cited, and also, more directly, the cases of *Calvin v. Luther*, 9 *Cow.*, 61, and *Tenney v. Tyler*, 8 *Wend.*, 569. In *Elliott et al. v. Piersol et al.*, 1 *Pet.*, 340, the Supreme Court of the United States say: "Where a court has jurisdiction, it has a right to decide every question which occurs in the

Clark v. Holmes.

cause ; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. This distinction runs through all the cases on the subject ; and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court where the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings."

As far then as authorities have come under my view, it would seem that the jurisdiction of special inferior tribunals, at least, may be inquired into in respect to their authority over the person, as well as the subject matter; and the want of jurisdiction may be shown by evidence, even when it tends to contradict the minutes or dockets which those tribunals may keep as records of their proceedings. In this case, however, the docket of the defendant does not show that he had jurisdiction of the person of the plaintiff, Clark, at the time of the rendition of the judgment against him. The summons had ceased to be operative on the 9th ; the case was not continued to another day, and was, in fact, at an end. And, on the case made, the judgment for the plaintiff must stand, and it must be so certified to the Circuit Court for the county of Livingston.

*Judgment affirmed.*

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Bank of Michigan v. Niles.

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**The President, Directors and Company of the Bank of Michigan v. Johnson Niles.**

Where, by the charter of a bank, it was provided that it should be capable of purchasing, holding, and conveying real estate for its use, but that the real estate which it should be lawful for the corporation to hold, should be only such as was required for its accommodation in relation to the convenient transaction of its business, or such as might have been bona-fide mortgaged to it by way of security, or conveyed to it in satisfaction of its debts previously contracted in the course of its dealings, or purchased at sales upon judgments which might have been obtained for such debts, Held, that the bank had no right to purchase lands for the purpose of selling them again; and that a contract entered into for that purpose was unlawful, and courts would not aid either party to enforce it against the other. (a)

Appeal from the Court of Chancery. (*Vide S. C. Walk. Ch., 99.*)

The complainants filed their bill in the Court of Chancery, to obtain the specific performance of a contract, entered into between them and the defendant, July 1st, 1839. The complainants thereby bound themselves, within sixty days thereafter, to convey to the defendant certain real estate described in the contract, and to obtain from one Jeremiah H. Pierson a good and sufficient deed of the property called the Rochester mill property, and convey to him three undivided fourth parts of it; and, in case a mortgage or incumbrance should be created for the purchase money of the mill property, they covenanted to pay the same, and have it released within five years from the date of the contract. They further agreed to deliver to defendant certain certificates signed by him, amounting to \$796.63. The defendant, on his part, agreed to execute a mortgage to the complainants for the purchase money to be paid by him, amounting to \$28,000, and to include, in addition, in the securities, certain notes, and the amount of the above mentioned certificates. The mortgage was to be executed on the property conveyed to him,

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(a) See Thompson v. Waters, 25 Mich., 214.

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*Bank of Michigan v. Niles.*

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and upon the remaining interest which he already possessed in it, as tenant in common.

Within the sixty days, the complainants purchased and obtained a deed for the mill property of Pierson, for \$5,000, which they paid and secured to be paid to him. They then made out and executed a deed to the defendant for three-fourths of it, together with the other property they were bound by contract to convey to him, and were ready and willing to perform their part of the contract.

The defendant demurred; and the chancellor having sustained the demurrer, the complainants appealed.

*J. F. Joy*, for complainants.

*A. D. Fraser*, for defendant.

FELCH, J., delivered the opinion of the court.

It is claimed on the part of the defendant, that the contract set forth in the bill was such as it was not competent for the complainants, under their charter, to make; that the buying and selling of real estate, except in the cases specified in their charter, is not within the scope of their corporate powers, and is unlawful; and that, the performance of this contract involving a violation of law, courts of equity would not interfere, or lend their aid to either party, to enforce it. Other questions of minor importance are presented, but we shall examine only that which pertains to the merits of the case as made by the bill.

The 3d section of the charter of the complainants (*Laws 1827, 505*) provides, that they "shall be in law capable of purchasing, holding and conveying estate, real or personal, for the use of the said corporation."

The 9th section provides, "That the lands, tenements and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation in relation to the convenient trans-

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Bank of Michigan v. Niles.

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acting of its business, or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts, previously contracted in the course of its dealings, or purchased at sales upon judgments, which shall have been obtained for such debts."

Under these, and the other provisions of the charter, what are the rights and powers of the corporation as to becoming purchasers and vendors of real estate?

A capacity to purchase and alien land, unless specially restrained by its charter or by statute, has been held to be an incident, at common law, to every corporation. This general power it has been found necessary, in England, to restrain by statute; and there their powers in this respect are understood to be general and unlimited, except so far as controlled by such statutes. A large proportion of the corporations there hold their corporate rights by prescription. This supposes the original grant nowhere to be found in written form. The uncertainty of the limits of the powers granted, and the great extent of powers claimed at an early period, created a necessity of limiting them by act of parliament. The statutes of mortmain have this effect, in reference to purchasing and holding lands.

In this country few instances can be found of the existence of corporations, whose charters did not originate in express legislative enactment, and are not to be found printed in the statute books. In these cases the grant of power is before us. The charter defines the grant, with its restrictions and limitations. Unless some other statute, enacted by the same authority, either general or special, can be found, enlarging or restricting those powers, we look no further for the rights of the body corporate.

A corporation, says Ch. J. Marshall, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly, or

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Bank of Michigan v. Niles.

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as incidental to its very existence: *Trustees of Dartmouth College v. Woodward*, 4 Wheat., 518. The same doctrine is asserted by McLean, J., in *Beatty v. Knowles' Lessee*, 4 Pet., 152, and is, in effect, contained in all the American cases on the subject. The act of incorporation, whatever may be its object, usually contains, in this country, a specific grant of a right to take and hold lands, but restricts it to certain defined objects, to a specific amount in value, or to such as are acquired in a particular mode. The better opinion seems to be that here, where charters almost uniformly contain such power and such limitation, corporations cannot take and hold real estate for purposes foreign to their institution: 2 *Kent's Com.*, 283; *First Parish in Sutton v. Cole*, 3 Pick., 223; *Ang. & Ames on Corp.*, 80. In determining on the extent of such power in a particular instance, under a charter, we are to look at the grant and the restriction; and, unless the power is found in the charter, it cannot be considered as possessed. The very grant of specified powers under restrictions, is an exclusion of other powers in reference to the same subject matter, not granted by the charter: *People v. Utica Insurance Co.*, 15 Johns., 357. The lawful right of the Bank of Michigan to become the grantee of lands, must, then, be such, and such only, as is given by the provisions of its charter. The 9th section clearly forbids the *holding* of any lands not specified by its terms.

It is urged by the counsel for the complainant, that the general power to purchase and convey real estate, given by the third section, is not affected or limited by the provisions of the ninth section. The latter only uses the word *hold*; and it is contended that the right of buying and selling lands is not unlawful; that the only design of the provision was to prevent real estate from being locked up in mortmain, in the hands of the corporation. But it seems to me that a further object is evident in the

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Bank of Michigan v. Niles.

charter. The general object of the charter is to create a money corporation, to give all the power required for banking operations, and no more. The corporation is expressly authorized to hold real property requisite for carrying on the banking business, and such as it may be necessary to receive in satisfaction of debts due it. But it is clear that it never was designed to make this corporation a real estate broker, or to permit it to divert its funds from their legitimate channels, to become a speculator in lands.

This design seems to me to be evident, not only from the tenor of all the provisions of the charter, but also from the limitations before mentioned. In *Ang. & Ames on Corp.*, 80, the design of this kind of restriction is said to be to prevent monopolies, and to confine these powerful bodies strictly within their proper sphere. In *Silver Lakes Bank v. North*, 4 Johns. Ch., 370, the chancellor speaks of the restraining clause in the charter as "only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations." See also *Trenton Bank v. Woodruff*, *Green's N. J. R.*, 117. It is clearly the intention of the law-makers thus to limit the operations of the bank; and that construction must be given to the act, unless a different meaning is conveyed by the words of restriction.

To sustain their view of the subject, on the part of the complainants, the case of *Leazure v. Hillegas*, 7 Serg. & Rawle, 313, is cited. This was an action brought by Hillegas to recover possession of certain premises occupied by Leazure. The title exhibited by the plaintiff showed a conveyance to the Bank of North America, and from the bank to the plaintiff's grantor. It was claimed that the bank had no power to take and convey the land, and, therefore, that no title could be derived through it by the plaintiff. The restraining clause in the charter of that

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Bank of Michigan v. Niles.

bank provides, that the lands it shall be enabled to "purchase and hold" shall be only such as are therein specified. The court held that, under this provision of the statute, it was prohibited only from holding a title—from retaining lands purchased, and not from purchasing. This decision was made directly with a view to the statute of mortmain, which was in force in Pennsylvania, and with reference to which the words might, perhaps, well have been considered as used by the law-makers. The effect of allowing corporations to take lands, under that statute, was, that the state would have the right immediately to take possession of, and to retain them. They became the property of the state whenever they were claimed by it.

The state, instead of having an object in restraining the banks from receiving conveyances, or dealing in lands, really had an object in permitting and promoting it. Every purchase was, at the option of the state, for its benefit; and, though the bank could convey it to another, yet the grantee took the property subject to the same right of the state to deprive him of it. The charter being granted with reference to the general statute of mortmain, then in force, and constantly attaching its consequences to all lands, the title to which passed through the corporation, it was not perhaps unreasonable to construe it, as not intended to prevent the buying of lands, subject to the right of the state, but only to holding or retaining them against the state. And the court, in the case last cited, say, that while the purchasing and *holding* might be dangerous, by bringing too much land into mortmain, yet purchasing subject to the statute of mortmain, which authorized the commonwealth to appropriate the land to its own use, could be attended with no danger. And, indeed, when this statute was in force, it could not be necessary to incorporate a clause in the charter restraining the cor-

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Bank of Michigan v. Niles.

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poration from buying property, although it might be to put a restriction on the amount they could retain as against the state. Without such restriction, there was no danger of their becoming dealers in land, and diverting their capital to this, instead of the legitimate business of banking. The forfeiture incurred under the statute of mortmain would prevent it, and the defect in a title passing from the corporation would deter purchasers. In the opinion of the chief justice just cited, the right of a corporation to purchase lands, though its charter is silent on the subject, is assumed. See also *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411.

The statute of mortmain has never been in force in this or any other state of the Union, except Pennsylvania. We cannot consider the restrictions or powers specified in the charter of the Bank of Michigan, as made in reference to such previous law, binding on the acts of the bank. Nor can we say that the mischiefs which it might otherwise be construed to include are already provided against by another law. On the contrary, it stands alone, and is to receive a construction warranted by its language, and in accordance with the evident intention of the law-makers, as disclosed by the act.

The disability to *hold* lands seems almost necessarily to imply a disability to become the grantee and vendor of real estate. There can be no grant of land without a grantee capable of taking; and he who takes and conveys to another must necessarily be, for the time intervening, the holder of the estate. If the restriction in the charter takes away the capacity to hold, it must, therefore, take away the power of receiving the estate for the purpose of conveying to another. The corporation cannot deal in real estate, receiving and conveying the title in its corporate capacity, without in every instance *holding* that estate; and a title derived through it, to be good, must necessarily

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*Bank of Michigan v. Niles.*

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imply the right of the corporation to take the estate and hold the title until conveyed.

When the statute restricts the corporation in the right of holding lands, it seems to me to intend to make all *holding* of real estate, for purposes not expressly excepted by the charter, unlawful. And this right is not measured by the length of time which the holding continues. If it is intended only to make the continued holding unlawful, when does such holding by the bank cease to be lawful? If it is lawful to take a title and hold for an hour, does it become unlawful if a conveyance should not be made for a day or a week? Does the lawfulness or illegality of the transaction depend on the length of time the title is held? If so, the tendency of the restriction would be to induce speedy conveyance by the corporation, but not to prevent its entering the field as a land speculator. It might relinquish its banking business altogether, and, investing all its means in, and directing all its attention to, the buying and selling of real estate, would keep within its charter, so long as titles passed rapidly on the record to and from the corporation.

It is said this provision was intended to have the same effect as the statute of mortmain, in preventing lands from accumulating and being bound up in the hands of corporations. To me it seems no such exclusive design could be had, because little necessity for accomplishing that object existed. This statute, like many of the ancient statutes of England, had its origin in a state of things which never did and never can exist in this country. The ecclesiastical corporations of that country, who held their corporate powers under no written grant, with no very well defined limits of power, and without specification of the time when their corporate existence should cease, absorbed in perpetuity many of the best lands in the kingdom, prevented their transmission from man to man, withdrew

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Bank of Michigan v. Niles.

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them from the feudal services which were ordained for the common defense, and curtailed the lords of the fruits of their seignories, their escheats, wardships, reliefs, and the like. This state of things made it necessary to provide that titles obtained by such corporations should not thus be absorbed forever, and to release the lands from what was quaintly denominated the *death-clutch* of the corporation. Scarcely a single reason exists here for the imposition of similar restrictions on the tenures of corporations. The holding of land by a corporation here deprives no lord of his accustomed services, or his rents, or his escheats, or his reliefs, attached to, or growing out of the land. It withdraws no feudal services from a superior, or from the government. Premises so held are liable to contribution for public expenses, as if held by individuals. They may be sold and conveyed voluntarily by the corporation, or taken by force of law for its debts, and the title of the institution defeated. Besides, we have few charters *in perpetuam*, and none whose powers are not clearly defined. The period of their existence is usually fixed by the very act that gives them life. The charter under which the complainants have existence, limits that existence to a period less than the average length of life of individuals. At the end of that time, unless legislative aid further extend its powers, all the lands held by the corporation cease to be so held. When there is no especial legislative act to the contrary, upon the dissolution of its charter, all the lands held by a corporation revert to the grantor. By the provisions of the present laws of this state, they become liable to be sold for the payment of its debts, and the proceeds to be distributed among the stock-holders; and if such sale should fail to be made, they would revert to the grantor.

From this view of the subject, it seems scarcely a reasonable construction of the limitation referred to, in the

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Bank of Michigan v. Niles.

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charter of the bank, to suppose that it was intended only to restrain the continued holding of lands for an indefinite period in the hands of the bank. Both the phraseology, and the evident intent of the restriction, appear to me to apply to that holding of land which is necessary in all cases of a conveyance to and from the bank. It is intended to restrain the corporation from entering into speculations and purchases of real estate, which are clearly foreign to the objects of its creation. The immunities incident to a corporation are thrown around its capital, its profits, and its business; but they are not intended to be extended to it as a buyer and seller of lands. Those which it may hold are specified, the necessary building for banking purposes, and such lands as it may be found necessary to receive for debts due to it. All others are without the scope of its legitimate powers and business.

It is not pretended that the lands mentioned in the complainant's bill are within this exception. The bill shows that the complainants were to purchase them of a third person, and to sell them to the defendant. It contemplated not even a payment in full by the bank, but, on the contrary, contains a contract that the complainants shall, within five years, clear the premises from any mortgage or incumbrance they may create upon it for the purchase money. It is difficult, from the facts set out in the bill, to look upon the transaction contemplated by the contract to be other than a speculation in lands, entirely foreign to the objects, and beyond the legal powers of the corporation. If such a transaction be construed as within the scope of its chartered rights, it is certain there can be no limit fixed to the business of a bank.

While I cannot doubt that the transaction contemplated by the contract was an unlawful one on the part of the bank, I do not deem it necessary to determine what would

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Bank of Michigan v. Niles.

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have been the effect on the title to the property, if such a conveyance had been made to the bank, and by it to another person. Many charters apply the restriction to the property which the bank shall be *enabled* to hold; this speaks of that which it shall be *lawful* for it to hold. Even under the former words, it seems to have been considered, in Pennsylvania and Virginia, that the title would not be defeated. A violation, and consequent forfeiture of its charter, would be a certain consequence of such unlawful act. But our inquiry here is not what would be the consequences of the act, but whether the act was lawful; and I am satisfied that the contract could never have been carried into effect by the bank, without holding real estate not allowed by its charter, and in violation of its provisions.

This leads to the second inquiry in the case—can this suit be maintained?

It was one of the earliest principles established, that courts of justice will not lend their aid in enforcing contracts which are contrary to law. If, in transactions of this character, either party has obtained the advantage of the other, however great may be the hardship of the case, courts will not aid one violator of law against the other, but will leave them as they are found. *Melior est conditio possidentis* is the maxim in such case, both in law and equity.

The rule applies as well when the subject matter of the contract is *malum prohibitum*, as when it is *malum in se*. In *Aubert v. Maze*, 2 *Bos. & Pull.*, 371, the doctrine which applies in cases of *malum in se* was applied to a transaction prohibited by statute. In *Watts v. Brooks*, 3 *Ves. Jr.*, 612, the same doctrine was applied in equity. In *Ribbons v. Crickett*, 1 *Bos. & Pull.*, 264, under the statute prohibiting the furnishing of provisions to voters, the court refused to enforce a contract by the defendant to pay for such provisions, upon the ground that it was a contract to disobey

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Bank of Michigan v. Niles.

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the law. The same principle runs through all the English cases.

The courts of this country have uniformly adopted the same principle, and refused to assist either party in the enforcement of a contract to violate the law: *Mitchell v. Smith*, 1 *Binn.*, 110; *S. C.*, 3 *Dall.*, 269; *Maybin v. Coulon*, 4 *Id.*, 298; *Duncanson v. McClure*, *Id.*, 308; *Nichols v. Ruggles*, 3 *Day's*, 145; *Pratt v. Adams*, 7 *Paige*, 615; *Armstrong v. Toler*, 11 *Wheat.*, 258; *Hannay v. Eve*, 3 *Cranch*, 242; *Patton v. Nicholson*, 3 *Wheat.*, 204; *Ex'rs of Cambioso v. Assignees of Maffett*, 2 *Wash. C. C. R.*, 98; *Bartle v. Coleman*, 4 *Pet.*, 184; *Craig v. State of Missouri*, 4 *Pet.*, 410.

In *Hunt v. Knickerbacker*, 5 *Johns.*, 327, the rule is laid down correctly, to be, that all contracts, which have for their object anything which is repugnant to the general policy of the common law, or contrary to the provisions of any statute, are void, and not to be enforced. This was a contract to sell lottery tickets without authority from the legislature of New York, which was rendered illegal by a law of that state; and the court refused to enforce the contract. "No case, I believe, can be found," says Thompson, J., "where an action has been sustained, which goes in affirmation of an illegal contract." *Burt v. Place*, 6 *Cow.*, 431. The inquiry as to the character of the act to be done, is, whether it is rendered illegal. It is, I apprehend, of no importance to determine what is the consequence of the violation of the law to the parties, whether it is visited with punishment as a criminal act, or is attended with civil consequences affecting the pecuniary interests of the parties, or whether they are left to the mercy of each other. When once it is determined that the act contracted to be done is prohibited by law, the court will afford no aid.

There may be a difficulty in cases where contracts are

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*Bostwick v. Dodge.*

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made in reference to matters but remotely tainted with immorality or illegality, and not the immediate subject of the undertaking of parties, to determine in what instances the principle should be applied; but when the very act contracted to be done is itself illegal, there can be no doubt of the application of the principle.

The Bank of Michigan contracted to obtain and convey a title to real estate, under circumstances which made it a transaction prohibited by the spirit and terms of its charter. The defendant, with knowledge of the unlawfulness of the transaction (for the charter is declared to be a public act), entered into the contract. Each party to the contract put himself in the power of the other; and, as a court of equity would not interfere to compel the bank to perform its agreement, by buying and selling lands in violation of the law, so aid cannot be afforded to the bank to compel the defendant to perform on his part. The decree of the chancellor sustaining the demurrer, must be affirmed.

*Decree affirmed.*

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*Bostwick v. Dodge.*

A person to whom a promissory note has been indorsed in payment of a pre-existing debt, is a holder for a valuable consideration, and is not affected by any equities between the antecedent parties, where he has received the note before it became due, without notice of such equities. (a)

Error to Lenawee Circuit Court. Dodge sued Bostwick in the court below in *assumpsit* upon a promissory note made by the latter, payable to Samuel F. Hooper or order, who indorsed it before maturity to the plaintiff below, in *payment* of a debt due to him from Hooper. On

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(a) This case overrules on this point *Ingerson v. Starkweather*, Walk. Ch., 346; see 5 Mich., 459. Approved *Outhwhite v. Porter*, 18 Mich., 533, 539.

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*Bostwick v. Dodge.*

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the trial, the defendant below offered to prove that the note was given for bills of the Farmers' Bank of Sandstone; that the bank was a fraudulent institution, never legally organized; and that the bills were entirely worthless when he received them and gave the note. The plaintiff below having objected to this evidence, it was rejected by the court. The defendant below excepted, and a bill of exceptions having been signed, removed the cause into this court by writ of error.

*N. R. Ramsdell*, for the plaintiff in error, cited 10 *Wend.*, 55; 20 *Johns.*, 367; 8 *Wend.*, 425; 13 *Id.*, 605; *Chitty on Bills*, 650.

*P. R. Adams*, for the defendant in error, cited *Briggs v. Rockwell*, 11 *Wend.*, 509; *Morton v. Rogers*, 14 *Wend.*, 575; *Brush v. Scribner*, 11 *Conn.*, 388; *N. Y. State Bank v. Fletcher*, 5 *Wend.*, 85; *Porter v. Talcott*, 1 *Cow.*, 359; *Burdick v. Green*, 15 *Johns.*, 247; 1 *Id.*, 34; 10 *Id.*, 104; 2 *N. Hamp.*, 336; 6 *Cranch.*, 253; 2 *Wash. C. C. R.*, 24, 191; 2 *Greenl.*, 121; *Swift v. Tyson*, 16 *Pet.*, 2.

RANSOM, C. J., delivered the opinion of the court.

The single question presented by this case is, whether the holder of a note or bill, transferred to him before maturity, in payment of an antecedent debt, shall be deemed to have received it for value, in the usual course of trade, and entitled to recover its amount of the maker, or acceptor; or, whether he merely succeeds to the rights of the indorser, and holds the paper subject to all the equities which may have existed between the original parties.

That the holder of negotiable paper, who acquires it without consideration, or *for* consideration, if overdue, or who has notice when he receives it, that it could not be enforced between the original parties, takes it subject to

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Boottwick v. Dodge.

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any defense that could be set up in an action between those parties, is a doctrine familiar to all. Equally well settled and understood is the principle, that any want or failure of consideration, whether partial or total, or any fraud even, between antecedent parties, will constitute no defense to a note or bill in the hands of one who obtained it in good faith, for a valuable consideration, at or before its maturity, and without notice of any circumstances impairing its validity. These principles are said by Justice Story, in *Swift v. Tyson*, 16 Pet., 15, to have been so long and well established, and to be so essential to the security of negotiable paper, that they are laid up among the fundamentals of the law, and require no authority or reasoning to be brought to their support.

In the case before us, there is no pretense that the defendant is not a holder in good faith without notice, and for a valid consideration as between himself and the indorser; but it is insisted that the transfer of the note in payment of a pre-existing debt, is not in the usual course of trade, and for a valuable consideration, as understood in the mercantile law; and therefore does not preclude the plaintiff from showing that the note was void in its inception for want of consideration. It is contended that the valuable consideration contemplated by the commercial law in reference to this question, is a *present* one, the payment of money, or delivery of goods, or other thing of value, at the time, and upon the credit of the transfer of the paper. We do not feel called upon to discuss this question, either upon principle, or by a review and criticism of the adjudged cases in which it is decided. In England, and in most of the states of the Union, it has been long and uniformly held, that the extinguishment of a pre-existing debt, was as valid and sufficient a consideration for the transfer of a negotiable instrument, as the payment of money, or the delivery of any species of prop-

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*Bostwick v. Dodge.*

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erty whatever. That the rule is one of great convenience, and necessity even, to a commercial community, is too obvious to require illustration, and its adoption in no way contravenes the principles of natural justice.

A different rule seems to have obtained in New York, as established in the cases of *Bristol v. Sprague*, 8 Wend., 425, and *Roosa v. Brotherson*, 10 Wend., 605. The more recent decisions, however, of the courts of that state, recognize the doctrine of the English cases. To this effect are the *Bank of Salina v. Babcock*, 21 Wend., 500; *Bank of Sandusky v. Scoville*, 25 Wend., 115, and *Williams v. Smith*, 2 Hill, 301.

In support of the view we have taken of this question, the following cases are referred to, and are believed to be perfectly conclusive: *Townly v. Sumrall*, 2 Pet., 170; *Swift v. Tyson*, 16 Pet., 2. The latter case is directly in point, and the opinion of the court, delivered by Judge Story, is an elaborate one, reviewing the authorities, both English and American. See also *Brush v. Scribner*, 11 Conn., 388; *Story on Bills*, § 192; 3 *Ken's Com.*, 81. Among the English cases to the same effect, are *Bosauquet v. Dudman*, 1 Stark., 1; *Haywood v. Watson*, 4 Bing., 496; *Pillaus v. Van Mierop*, 3 Burr., 1664; *Ex parte Bloxham*, 8 Vesey, 531. See also *Bayley on Bills*, 527; *Chitty on Bills*, 85.

We are of opinion that the evidence offered by the defendant was properly rejected. There is, therefore, no error in the record, and the judgment of the court below must be affirmed, with damages and costs.

*Judgment affirmed.*

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*People v. Judges of the Calhoun Circuit Court.*

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**The People ex rel. Hyde v. Judges of Calhoun Circuit Court.**

The discontinuance of a suit in attachment by the original plaintiff, will not impair the right of a creditor who has previously filed his declaration in the cause, to proceed to judgment, nor affect his lien upon the property attached.

A motion to set aside a judgment for irregularity, made two years after it was rendered, the delay being unexplained, will be deemed too late. (a)

Where one creditor only obtains a judgment in a suit commenced by writ of attachment, it is not necessary that the order of sale of the property attached, authorized by the statute (R. S., 511, § 17), should require the money arising from the sale to be paid into court; but if it require the same to be paid to the plaintiff, this will not vitiate either the order, or the proceedings under it.

This court will not grant a *mandamus* to compel the Circuit Court to set aside a sale of property attached, to satisfy a judgment in that court in a suit commenced by attachment, on the ground that the sheriff's return does not show all the steps required by law to make a valid appraisal and sale to have been taken, where it is made to appear, by affidavit of the sheriff, that such steps were in fact taken.

The Circuit Court might, upon application, founded upon such affidavit, grant an amendment of the sheriff's return. This court, however, has no power to grant the amendment.

A judgment in a suit commenced by writ of attachment, will not be set aside for irregularity, on the motion of a person to whom the property attached had been conveyed by the defendant, after service of the attachment, but who is a stranger to the record.

**Motion for a *mandamus*.** On the 19th day of February, 1839, Charles P. Dibble sued out a writ of attachment against Charles T. Moffatt, an absconding debtor, returnable in the Circuit Court for the county of Calhoun, which was served on the same day, by attaching certain real estate of the defendant, and by filing with the proper register of deeds a copy of the writ and a statement, as required by the statute (R. S., 507, § 5), in order to perfect the lien upon the property. At the next May term of the Circuit

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(a) See *Spafford v. Beach*, 2 Doug., 150.

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People v. Judges of the Calhoun Circuit Court.

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Court, the defendant was duly called and his default entered. On the 25th day of June, 1839, Schuyler and Wallingford, creditors of the defendant, filed their declaration under the attachment; and on the 2d day of the following November, Dibble, the original plaintiff, entered a discontinuance of the suit. Schuyler and Wallingford afterwards proceeded, however, in the prosecution of their claim, and at the May term, 1840, obtained a judgment for \$666.53, and an order for a sale of the property attached, to satisfy the same; which order required that the money arising from the sale should be paid to them. The property was sold by virtue of this order.

On the 14th day of March, 1839, the defendant conveyed the property to Hyde, the relator, who was not a party to the suit, by deed recorded April 6, 1839; and, at the May term, 1842, after the sale, and return of the proceedings under the order, he made a motion to the Circuit Court, founded upon affidavits of the above facts, and upon the papers and proceedings in the cause, for an order setting aside the judgment, and all the subsequent proceedings, for sundry alleged irregularities. This motion having been denied, the relator now applies to this court for a *mandamus* to compel the Circuit Court to set aside the order denying the same, and to grant the motion.

*Bradley*, for the relator.

*Woodruff*, *contra*.

*FELCH*, J., delivered the opinion of the court.

The motion below was founded on objections: 1st, to the judgment against the defendant in attachment; 2d, to the order of sale under which the land claimed by the relator was sold; and 3d, to the officer's return of the proceedings in making the sale under the order.

1. Various irregularities were urged as objections to the

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People v. Judges of the Calhoun Circuit Court.

judgment. The papers, however, show that the suit was well brought by the original attaching creditor, Dibble, and due service of the writ made, by attaching the land claimed by the relator, which was at that time the property of the defendant in attachment. The creditors, Schuyler and Wallingford, had the right, under the statute, to file their declaration, and the discontinuance by the original attaching creditor did not impair their right to proceed in the suit, and obtain judgment. Their lien was perfect, on the land attached, according to the provisions of the statute; and, after due notice to the world of the attachment, by filing notice thereof in the office of the register of deeds, the subsequent purchaser could only take the land subject to the lien of the creditor, created by the attachment. These considerations are important here, as showing that the Circuit Court had jurisdiction, not only in the suit instituted by Dibble, the attaching creditor, but also to proceed under the statute after his discontinuance, and adjnicate on the claim of Schuyler and Wallingford. The court having this jurisdiction of the matter, the motion to set aside the judgment must depend entirely upon the alleged irregularities in the proceedings in the suit.

There is a fatal preliminary objection to the examining of these irregularities on this motion, arising from the lapse of time. The judgment was rendered two years before this motion was made; and three regular terms of the court had elapsed. The rule of practice requires the party complaining of irregularities to present his application to the court the first opportunity after the irregularity has taken place, and before any further proceedings have been had in the cause by the party complaining of it: *Grah. Pr.*, 702. In New York, motions to set aside inquests for irregularity have often been denied, because they were not made at the earliest opportunity. Thus, in *Hinde v.*

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*People v. Judges of the Calhoun Circuit Court.*

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*Tubbs*, 10 Johns., 436, the court denied the motion, because one term had intervened. In *Thorp v. Fowler*, 5 Cow., 446, seven years had elapsed; and the court term it a case of gross negligence, and refused the motion, although accompanied by an affidavit of merits. In *Nichols v. Nichols*, 10 Wend., 560, only about three months had passed; yet the court say, in denying the motion, that, as it was an attempt to deprive the plaintiff of his judgment on the ground of mere irregularity, the defendant would be held to the strictest rules of proceedings, and, having been guilty of laches in making his motion, he was not entitled to be heard.

No excuse, or reason why the application in this case was made at so late a day, is given in the affidavits filed in the case; and the laches of the applicant is such as to prevent the success of his application to set aside the judgment.

2. The court was asked to set aside all proceedings on the order of sale, on the ground that the order itself was invalid. It ordered a sale of the property, and that the money should be paid to the plaintiffs. The relator objects that the order should direct the money to be paid into court. The statute (*R. S.*, 511, § 17) provides for the sale, and that the money arising therefrom shall be divided among the several creditors in proportion to their claims. I do not understand the order as directing the officer to pay over the money collected to the creditors. It is consistent with its terms that he should bring it into court to be paid over. I do not understand the statute as prohibiting the court from making an order, if it should be deemed advisable, that the officer should pay it over to the creditor directly. When there is but one creditor obtaining judgment, as in this case, the money may take the same course as in an ordinary case of money collected on an execution. In that case the precept contemplates the

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People v. Judges of the Calhoun Circuit Court.

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payment of the money into court, yet, in all cases, where there are no conflicting claims to the same, a payment to the creditor is recognized by the court as good. In the case before us, the order saying that the money should be paid to the plaintiffs, who alone were entitled to it, to the amount of their joint debt, cannot vitiate either the order or proceedings under it.

3. The third objection is, that the sheriff's return does not show all the steps required by law to make a valid appraisal and sale to have been taken, and that the sale should therefore be set aside. Among the papers submitted in opposition to this motion, is an affidavit of the sheriff, showing that all the regular steps were taken as required by law, in making the appraisal and sale. It often happens that the returns of officers in such cases are imperfect, and great indulgence is extended by courts, in allowing them to supply any deficiency, where it can be done in accordance with the facts. Application is made here for leave to amend. That leave cannot be granted by this court; but, while the affidavit states facts which would authorize the amendment of the sheriff's return in the court below, we will not, by *mandamus*, compel the Circuit Court to set aside its proceedings.

There is another reason why this motion should not be granted, or at least so much of it as asks the setting aside of the judgment. The relator, being a stranger to the record, and not a party in the suit, cannot question the validity of the judgment. It is unnecessary to determine whether the court should listen to his application to set aside the proceedings in making the sale under the order. Such applications have sometimes been heard.

GOODWIN, J., did not participate, the cause having been argued before he took his seat upon the bench.

*Mandamus refused.*

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Palmer and others, Appellants.

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**John Palmer and others, Executors of Julia A. Anderson,  
Appellants.**

It may well be doubted whether an administrator is authorized, in any case, to give credit, upon the sale of real estate of the intestate for the payment of his debts, under an order or license of a Court of Probate; and whether, if he does so, he is not chargeable with the price, as money in his hands for the creditors and others who may be entitled to it.

Equity gives to the vendor of real estate a lien upon the land for the purchase money unpaid in the absence of any agreement or security having the effect to surrender it. (a)

But if the vendor take a distinct and independent security for the purchase money, other than the mere personal obligation of the vendee, as if he take a bond of the vendee with sureties, or his promissory note with indorsers, the lien is gone; this being considered evidence that he did not trust to the estate, as a pledge for his money.

If, on a sale of real estate of an intestate, under an order or license of a Court of Probate, the administrator gives credit for a part of the purchase money, and takes indorsed notes of the vendee as security for the payment of the same, thereby parting with the equitable lien upon the land, and any portion of the amount so secured is lost by the subsequent insolvency of the parties to the notes, the administrator will be personally answerable to the estate for such loss; and this though, when the notes were given, the parties to them were in good credit, and reputed to be responsible, and there has been no laches in using the legal means for collecting them, and although, in consequence of the credit given, the price obtained for the property, exceeded what it would have brought on a sale for cash, by an amount greater than the amount lost by the failure to collect the notes.

Appeal from the decree of the Judge of Probate for Wayne county. The decree and facts upon which it was based, as agreed upon were as follows: In 1836, Julia A. Anderson, as administratrix of her late husband, John Anderson (who died intestate, leaving no children, and largely indebted), acting under an order or license of the Court of Probate authorizing a sale of certain real estate of the intestate for the payment of his debts, sold certain outlots and tracts of land in and near the city of Monroe,

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(a) *Carroll v. Van Rensselaer*, Harr. Ch. R., 235; *Sears v. Smith*, 2 Mich., 243; *Mowry v. Vandling*, 9 Mich., 39; *Converse v. Blumrich*, 14 Mich., 109. See *Payne v. Atterbury*, Harr. Ch., 414.

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Palmer and others, Appellants.

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mentioned in the order, on the terms of one-third cash down, and the balance payable in two equal annual installments, with interest, and secured by promissory notes of the several purchasers, each having two responsible indorsers. On these terms, sales were made to different persons to the amount of \$3,565.38, which was all collected by the administratrix except two items, viz.: \$108.33, being the last installment due on a purchase to the amount of \$325.00, made by Norman D. Curtis, which installment was secured by the promissory note of Curtis, with two indorsers; and also \$346.68, being the last installment due on a like purchase to the amount of \$1,040, made by James Q. Adams, which installment was also secured by a like note of the purchaser, with two indorsers. These two items, amounting to \$455.01, were lost by the insolvency of the makers and indorsers of the notes.

Mrs. Anderson having died before her administration of the estate of her husband was closed, the appellants, executors of her last will and testament, rendered her account as administratrix, in which the above sum of \$455.01, was deducted from the aggregate amount of the sales of real estate, and credit was given for the balance only—the amount actually collected.

A hearing was had before the Judge of Probate for the settlement of the account, at which the above facts appeared; and it was there further testified by Robert McClelland, Henry Chipman and Lucius Abbott, that the real estate, in their opinion, sold for one-third more, in consequence of the credit given, than it would have brought had it been sold for cash down; and the two latter witnesses testified, also, that at the time of the sale, both the makers and indorsers of the notes above mentioned, were in good credit and reputed to be responsible; that suits were commenced against them on the maturing of the notes, and with due diligence prosecuted to judgment; that legal

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Palmer and others, Appellants.

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diligence had been used by the administratrix to recover the money, but to no purpose; and that nothing had been or could be collected from the parties to the notes, as, soon after the sale, their real property depreciated in value. This testimony was uncontradicted before the Judge of Probate, and is now submitted as a part of this case.

The Judge of Probate decreed that the estate of John Anderson should be credited with the two items above mentioned, amounting to \$455.01. From which decree this appeal was taken to this court.

*A. D. Fraser and Henry Chipman, for the appellants.*

*H. T. Backus, contra.*

GOODWIN, J., delivered the opinion of the court.

1. The first question which arises in this case, and which has been argued by counsel, is, had the administratrix authority to sell the real estate on a credit, or rather to give credit upon the sale? It is insisted, on the part of the appellees, that she had not; and that, having done so it was at her own hazard, and the estate is not chargeable with the loss. On the other hand, it is contended that, in executing the authority to sell, granted by the court under the statute, the administratrix had a discretion to give credit, if, in her judgment, the interests of the estate would be subserved by it, and if she exercised this discretion in good faith, with proper diligence, and without negligence. The solution of this question depends upon the construction of the statutes of 1833, under which these proceedings were had, and the rules which the law applies to such powers as that conferred.

It is to be remembered that, while personal property of the intestate passes to the administrator upon his appointment, and vests in him absolutely, to be applied and distributed, to be sure, in due course of administration, the

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Palmer and others, Appellants.

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real estate does not. It descends immediately to the heirs; their title, however, being subject to be devested, in case it should be required, and a sale of it authorized, for payment of the intestate's debts. He cannot, as such, enter upon it, or maintain any action in regard to it. He can only sell and convey it upon being licensed to do so, in the exigency specified in the statute, when the personal property, which is the primary fund for the payment of debts, is insufficient for that purpose: *Laws* 1833, pp. 291, 292, 308, 310; 3 *Mass.*, 258; 4 *Id.*, 354; 5 *Id.*, 240; 3 *Cow.*, 299; 6 *Conn.*, 373.

In examining the sections of the act under which the license was obtained (*Laws* 1833, pp. 291-2), in conjunction with the other provisions in respect to the powers and duties of administrators, there is much force, certainly, in the position assumed by the counsel for the appellees, that the administrator, as such, cannot give credit on such sale, except at his own hazard entirely. The power is a special one, conferred under the statute for a specific object —the payment of the debts of the intestate—and limited, as to the quantity to be sold, to what shall be deemed necessary for that object, if the whole be not required; the court, however, having power to order the sale of more, if a partial sale would be injurious to the residue. The outstanding debts are to be paid; and they are generally due, and must be presumed to be, or about to become so, when application is made to sell the real estate, and devest the title and possession of the heirs; and the object of the sale would seem to require prompt payment of the money upon it. Powers and trusts of this nature, for the benefit of others, are, by the general law, required to be executed promptly, or with all reasonable dispatch. By the statutes referred to, time is given to the administrator to look into and ascertain as to the solvency of the estate, and he is privileged from answering to suits for the

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Palmer and others, Appellants.

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period of one year for this purpose; and, if he finds it insolvent, upon representation of that fact, a commission is appointed to receive and audit the claims, and the whole estate, personal and real (except that which the statute bestows upon the widow in such case), is to be converted into money and distributed among the creditors *pro rata*. After the expiration of the year, if this be not done, and the debts remain unpaid, he may be sued, and judgment had against the estate, and both the real and personal estate subjected to execution on the judgment. And, in the very next section to that providing for the levy of real estate on an execution against him (*Laws* 1833, p. 294), it is provided, that, when he "shall neglect, or unreasonably delay to raise money out of the estate, by collecting debts due to such estate, and selling the personal estate, or real estate (if need be, and he has power, or can obtain license to sell the same), or shall neglect to pay what he has in his hands, and by such neglect or delay shall subject the estate, real or personal, to be taken in execution, the same shall be deemed waste, and unfaithful administration." Now, upon view of this section, and the consequences contemplated to the administrator at the expiration of the year, if the property has not been converted into money for the payment of the debts—especially taken in connection with the other provisions, and the general rule above adverted to—it may well be doubted whether an administrator is authorized at all to give credit upon the sale of real estate in such exigency; and whether, if he does so, he is not chargeable with the price, as money in his hands for the creditors and others who may be entitled to it. The oath which has been adverted to in argument, required of the executor or administrator, that he will use his utmost endeavors to dispose of the estate in such manner as will produce the greatest advantage to all persons interested therein, and that, without any sinister views whatever, I

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Palmer and others, Appellants.

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do not consider as conferring any power, but as designed to secure diligence and good faith, in the use of all those means which, upon such sales, may be resorted to by a diligent and faithful man, to enhance the price; of which the most material would be a full disclosure of all the circumstances which may be in his knowledge, going to show the situation, advantages, and value of the property—circumstances important to a purchaser in the exercise of his judgment in bidding.

But, although the reasons may be strong in favor of the proposition that, in case of such a sale upon credit, the price would be, immediately upon the execution of the conveyance, money in his hands to be administered; and the debt of the purchaser created by the obligation, would be to him in his own right; yet, from the view which we entertain of the second question presented, we do not deem it necessary to decide, and to go so far as to say, that in no case, and under no circumstances, can an administrator exercise such a discretion, without becoming personally chargeable.

2. The second question is, admitting that the administratrix might exercise a discretion to sell on credit, without becoming so chargeable, was the discretion in this case properly exercised? Let it be remembered that the title to the land was not in her, but in the heirs, and that she executed a special authority in making the sale for a special purpose. It was competent to retain a lien on the land for the portion of the purchase money unpaid. Further, in the absence of any agreement or security having the effect to surrender the lien, equity gives it. It may be waived by the acts of the parties showing that it was not intended to be retained. If the vendor take a distinct and independent security for the purchase money, it has been held the lien is gone—such a security having been considered evidence that he did not trust to the estate as

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Palmer and others, Appellants.

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a pledge for his money; although it has been held that the obligation of the purchaser alone, is not such a security, but that a bond with sureties is; and so of notes: 2 *Sugd. on Vend.*, 62, 65; 2 *Story Eq. Jur.*, 464, 475; 2 *Madd. Ch.*, 129, 130; 6 *Ves.*, 752; 15 *Id.*, 329; *Gilman v. Brown*, 1 *Mason*, 212.

Was the administratrix justified in parting with the lien in this case, and taking personal security only?

It is insisted on the part of the appellants, that the duties of the administratrix are those of a trustee; and that the doctrines governing the relation of trustee and *cestui que trust* are applicable. The administratrix, in relation to the personal property of the estate, is certainly a trustee. So also as to avails of real estate sold under the statute; and she may also be said to be so in relation to the execution of the power and license for sale of the real estate. It is further contended that, in the management of a trust, the law requires good faith, including honesty and diligence carefully applied, a departure from which is a breach of trust, for which the trustee is liable; and that no more than this is required. In the case cited of *Hester v. Hester*, 1 *Dev. Ch.*, 331, this doctrine is sustained. In that case, it is held that a breach of trust supposes that there is a rule for the government of the trustee; that, where a rule is prescribed by the creator of the trust, it must be adhered to; that, "in the absence of one prescribed by him, the law requires good faith, which includes not only what is understood by honesty and integrity, but care, diligence and attention, and, in matters of judgment and discretion, that they should be carefully applied." And, in the case of *Bryan v. Mulligan*, 2 *Hill's Ch.*, 364, the rule is laid down, "that executors, administrators, and others acting in a fiduciary character, are bound to manage the funds committed to their care, with the same care and diligence that a prudent man would bestow upon his

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Palmer and others, Appellants.

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own concerns;" that, when a loss arises, the question is, "whether it has happened from casualties against which no one is expected always to guard, or from his want of care and circumspection."

We are not without authority and precedent more directly in point. In 2 *Madd. Ch.*, 134, it is laid down that two principles appear to have been adopted in regard to the liability of executors, who, it is said, are trustees: 1. That, with a view not to deter persons from undertaking a trust, the court is extremely liberal, and will so determine as not to strike a terror into mankind, acting for the benefit of others, and not their own. 2. That care must be had to guard against an abuse of trust; and various decisions are cited in support of the doctrine. After giving various cases in which they have or have not been held personally liable, and the principles applicable, on page 146, it is laid down that "executors are not justified in laying out money on *personal security*; and, though trustees were expressly empowered to lend the trust money on real and personal security, it was held they were not justified in lending it upon bond to a trader; they must, in such cases, take the best security; nor can they, without great reason, permit debts due upon personal security to remain longer than is absolutely necessary, especially where *infants* are concerned. If they neglect to call in money due on bond, they will be liable." And the cases referred to support the doctrine of the text. In the case of *Wilkes v. Steward, Coop. Ca.*, 6, the will empowered the defendants, executors, to lay out the legacy in *the funds*, "or on such other security as they could procure and think safe." Sir William Grant, M. R., held, "that the defendants had no power to lay out the money on personal security." In a note to the case of *Harden v. Parsons*, 1 *Eden's Eq.*, 145, 150, relied on by the appellants' counsel, it is stated that "it is now, however, clearly settled

Palmer and others, Appellants.

that executors or trustees cannot lend money on personal security ;" overruling the doctrine of the case itself.

The case of *Adye v. Feuilletian*, 1 *Cox's Ch. Ca.*, 24, was, in some of its circumstances, very analogous to this; especially in regard to the equities insisted on. Upon a bill filed by infant legatees to carry the trusts of a will into execution, accounts were directed of the personal estate; and, the master having made his report, the defendant excepted thereto, "for that the master had not allowed him in his discharge a sum of £1,000, which the defendant and another of the executors had lent on bond in Jamaica, the obligor having died insolvent." It appeared that, at the time the money was lent, the obligor was in good circumstances; that, *the interest being 8 per cent*, the estate had been increased to the amount of £5,000, by the executors' having lent money in like manner; and that the testator had constantly employed his money in that way during his life time. It was contended for the defendant, precisely as it is here, that "an executor is not liable for losses, if he did with the testator's property as a prudent man would have done with his own;" and, further, that the estate had been increased £5,000 by the mode of laying out the money, and that it was therefore hard that the executor should suffer for the deficiency. Lord Loughborough says, "An executor must always be answerable for an infant's money. The particular circumstances cannot weigh. The executor has certainly behaved very honorably in this case; but it would be dangerous to break through the general rule. And the lord commissioner adds, "The court will always discourage lending trust money on private security, though larger interest may be gained. It becomes a species of gambling." And the exception was overruled.

In the case of *Holmes v. Dring*, 2 *Cox Ch. Ca.*, 1, where £300 was lent by the executors on bond with surety, and

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Palmer and others, Appellants.

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the obligors were in very ample circumstances at the time, but afterwards became insolvent, Lord Kenyon, Master of the Rolls, in deciding says: "The bond of several persons cannot be distinguished from the bond of one person, as applied to this case. It was never heard of, that a trustee could lend an infant's money on private security. This is a rule that should be rung in the ears of every person who acts in the character of trustee; for such an act may very probably be done with the best and honestest intention, yet no rule in a court of equity is so well established as this."

In *Powells v. Evans*, 5 *Ves. R.*, 839, Lord Alvanley held the executor responsible when he permitted, negligently, and without good reason, money to remain longer than was absolutely necessary upon personal security taken by the testator in his life time.

In *Smith v. Smith*, 4 *Johns. Ch.*, 284, Chancellor Kent reviews many of the English decisions, and gives it as the modern rule, that "an executor must not even rest on personal security; and, if he does, it is at his own hazard." He comments, however, on its strictness, and refrains from deciding whether, in possible cases, he might not depart from it.

Justice Story, 2 *Com. on Eq.*, § 1274, after commenting on this subject, and referring to the principles and cases, says: "So, if a trustee should invest trust money in mere personal securities, however unexceptionable they might seem to be, in case of any loss by the insolvency of the borrower, he would be held responsible; for, in all cases of this sort, courts of equity require security to be taken on real estate, or on some other thing of permanent value."

This doctrine seems now too well established to be questioned. And, if it is to be applied to investments made by executors and trustees, of money in their hands,

Palmer and others, Appellants.

much more, *a fortiori*, is it applicable to administrators and executors transferring the title of the estate, and voluntarily parting with that lien which the law would otherwise create, and thereby depriving the creditors and *cestui que trust* of that security. In doing so, they must be held personally chargeable. The provision of the section (*L.* 1833, *p.* 293, § 2) authorizing, when a part only of the real estate is wanted for the payment of debts, and a partial sale would injure the remainder, a sale of the whole, requires that, in certain cases, the surplus of the proceeds shall be put at interest on good securities. If the money had been actually received by the administratrix, and, under this section, loaned on such securities as were taken for the price of the land sold in this case, a personal liability, under the rule laid down, would certainly have been the consequence. Much more is it so under the case presented.

It was urged in argument, that the administratrix could not have sold for the same price and retained the lien ; that the purchasers bought to sell again, and required an unencumbered title. These alleged facts do not appear in the case ; and, if they did, under the rule laid down in the books, it would seem to make no difference ; for the executor is not authorized, even for the benefit of the estate, to run any such hazard. He cannot so speculate, except at his own risk.

It was said that, at the period referred to, it was customary generally to sell real estate upon credit, and we were asked to take judicial notice of this as part of the history of the times. If we should do so, we must also take notice of the fact, that then, and ever since, and before, to the period when the memory of man runneth not to the contrary, it was the general usage, here and elsewhere, upon selling real estate on credit, to retain security upon it for the purchase money, until paid. The

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Palmer and others, Appellants.

Roman law gave such a lien in the absence of any express agreement, both in reference to personal and real property ; and from that, it is suggested by Justice Story, it was probably introduced in respect to real property, into our equity system.

It has been urged upon us that the administratrix, by selling on credit as she did, obtained, in the enhanced price, an excess of some \$1,500, being much more than the deficiency ; that consequently there is, even if the amount of the loss be charged upon it, a gain to the estate of several hundred dollars, and that it is, therefore, inequitable that the estate of the administratrix should be charged with this loss. The full force of this is felt, and the insisting upon it does seem to be a hungry demand of the pound of flesh. But we cannot depart from the established rules of law, to relieve the hardship of a particular case. We can only say, while we apply them, as was said by the master of the rolls, in the case of *Ves v. Emery*, 5 Ves., 144, we wish that we could, consistently with the rules of the court, hold the administratrix fully justified. That was a case in behalf of infants, where the rule adopted compelled the executor to pay £200 out of his own pocket. "This is," said he, "a most ungracious demand; and if the plaintiffs were adults they would not have thought it proper." Yet, in this case, for aught that appears, if the administratrix had retained security upon the estate sold, which common prudence would seem to have required, no loss, it is presumed, would have accrued. She saw fit, in her discretion, with fair and upright motives, no doubt, to do otherwise. The rule of law was violated ; the hazard was her own ; and her estate must bear the loss. The decree of the Probate Court must be affirmed.

*Decree affirmed.*

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*People v. Judges of the Washtenaw Circuit Court.*

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**The People ex rel. Drew v. The Judges of Washtenaw Circuit Court.**

Where a plaintiff suffers ten days to elapse after plea of the general issue without amending his declaration, his right to amend of course, under the 27th rule of the Circuit Courts, becomes extinguished. *Held*, therefore, that after a trial of the issue, verdict for the plaintiff, verdict set aside, a new trial granted, leave given to the parties, by special order of the court, "to file new pleadings under the general rules," an amended declaration filed under this order, and demurrer thereto, the plaintiff had no right to file a second amended declaration without special leave granted by the court.

A declaration may be amended by adding new counts, so as to lay the contract or wrong in a different manner, but a new cause of action cannot be introduced by amendment.

An action founded upon a statute, cannot be joined with an action at common law.

*Held*, therefore, that counts in debt to recover the penalty for usury under the statute (R. S., 161, § 7), could not be amended by substituting counts for money had and received. (a)

A motion to strike an amended declaration from the files, and the decision of the Circuit Court thereon, would constitute no part of a common law record of the case. Nor could exceptions be alleged to such decision under the statute. (R. S., 333, § 16.) It could not, therefore, be brought before this court for review, by writ of error.

Application to this court for a *mandamus* is the proper remedy of a party seeking to obtain a reversal of such decision. (b)

**Motion for a *mandamus*.** John Gilbert and Abel Godard brought an action of debt against John Drew, the relator, in the Circuit Court for the county of Washtenaw, to recover the penalty for usury under the following statute: "Whenever a greater rate of interest than is allowed by law, shall have been paid, the party paying the same may recover back threefold the amount of the excess of such interest so paid, by action of debt: Provided, such action shall be prosecuted within one year after such

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(a) Approved: *People v. Judge of Wayne Circuit Court*, 18 Mich., 305.

(b) See *Willey v. Judge of Allegan Circuit*, 29 Mich., 495; *People v. Bacon*, 18 Mich., 247.

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People v. Judges of the Washtenaw Circuit Court.

interest shall have been paid:" *R. S.*, 161, § 7. The declaration contained several special counts, all founded upon the statute. Plea, general issue. The cause was tried at the May term, 1842, of the Circuit Court, before the Hon. A. FELCH, Presiding Judge, and a verdict found for the plaintiffs, which was afterwards set aside and a new trial awarded. On the 2d of December following, on application of the plaintiffs, the following order was made in the cause: "Leave given to the parties to file new pleadings under the general rules." Under this order the plaintiffs filed an amended declaration, January 16, 1843, based also upon the statute above quoted. The time for pleading having been extended thirty days, by special order of the court, on the 11th of March following, the defendant filed a demurrer to this amended declaration;\* and, on the 27th of the same month entered the plaintiffs' default for want of joinder therein. Three days before the entry of this default, the plaintiffs, without any special leave granted by the court, or a judge thereof, filed a second amended declaration, containing only the common counts in debt for money had and received; and, on proof of service of a copy thereof, with notice to the defendant to plead thereto within the time prescribed by the rules of the court, entered the defendant's default for want of plea.

At the June term, 1843, the plaintiffs moved that the default of the defendant for want of plea to the last amended declaration, be made absolute; and the defendant moved that this default be set aside, and the said second amended declaration be stricken from the files; and also, that the plaintiffs' default for want of joinder in demurrer, be made absolute. Whereupon, the court made the following order:

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\* On the 6th of March an act was passed, which took effect on that day, repealing the section of the Revised Statutes above quoted: *S. L.* 1843, p. 54.

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*People v. Judges of the Washtenaw Circuit Court.*

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"Ordered, that the motion heretofore made by defendant to set aside the amended narr., and to make the default of the plaintiffs for want of joinder in demurrer absolute, be overruled; and that the motion of plaintiffs to make absolute the default for want of plea to the amended declaration filed in the case, be overruled; and that the defendant have leave to plead to amended narr. *last* filed, within thirty days from the date of this order; and that the defendant's default for want of plea be set aside."

Application is now made to this court by the defendant (the relator) for a *mandamus*, commanding the judges of the Circuit Court to vacate the above order, except so far as the same denies the motion on the part of the plaintiffs to make absolute the default of the defendant for want of a plea to the second amended declaration; and also, commanding them to grant the motion made by the defendant.

*A. D. Fraser*, for the relator :

1. The second amended declaration was irregularly filed. The 27th rule of the Circuit Courts confers only the right to amend *of course*, after the return of the writ, and before any action of the court upon the pleadings. After that time, amendments can only be made under an express order of the court: *Grah. Pr.*, 653; 6 *Com. Dig.*, 29, *Amendments L.* 2.

2. It was not competent by amendment to introduce a new cause of action; or, as was done in this case by the second amended declaration, to abandon the former cause<sup>s</sup> of action, and substitute a new one, differing from it in form, substance and fact: 1 *Am. Com. Law*, 337; 8 *Serg. & Rawle*, 268; 3 *Mass.*, 210; 1 *Pick.*, 204; 3 *Pick.*, 12; 1 *Id.*, 204; 5 *Pick.*, 305; 2 *Archb. Pr.*, 267; 6 *T. R.*, 544; 7 *Id.*, 55; 1 *Tidd's Pr.*, 698; 16 *E. C. L. R.*, 403; 2 *Serg. & Rawle*, 1; 15 *Id.*, 81; 5 *Binney*, 53; 4 *Yeates*, 507; 2 *Whart. Dig.*, 36, 38; 1 *Miles*, 67;

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People v. Judges of the Washtenaw Circuit Court.

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4 *Watts' R.*, 55; 1 *Am. Com. Law*, 324; 5 *Monroe's R.*, 440.

3. This was originally a penal action; and courts in the exercise of their discretion have repeatedly refused to permit amendments in such actions: 6 *Hayw.*, 174; 1 *Metc. & Perk. Dig.*, 75, § 102; 21 *E. C. L. R.*, 151; 4 *Harr. Dig.*, 2284; especially where, as in the present case, the allowing such amendments would be in effect a permission to bring a new action, to which, otherwise, the statute of limitations might be pleaded: 4 *Day*, 37; 2 *T. R.*, 707; 6 *Id.*, 171; *Barnes Ca.*, 488; 4 *Yeates*, 507; 6 *Serg. & Rawle*, 295.

Again: courts will not allow amendments after a variance which common care would have prevented: 5 *J. B. Moore*, 164; 2 *Brod. & Bing.*, 395; 6 *E. C. L. R.*, 165; 1 *Harr. Dig.*, 51.

4. The second amended declaration was for money had and received; the original and former amended declaration was founded solely upon the statute, *R. S.*, 161, § 7, and concluded "against the form of the statute." It was necessary that a declaration to recover the penalty given by the statute, should so conclude: 2 *Pet. Dig.*, 21, 211; 1 *Gall.*, 26, 261, 257; 13 *Petersdorf*, 206; 7 *Am. Com. Law*, 297; 15 *Law Lib.*, 92. The verdict and judgment are of a special nature under the usury act: 5 *Cow.*, 678. An action at common law cannot be joined with an action upon a statute: *Jenk.*, 211; 1 *Com. Dig.*, 222, G. 1; 2 *Whart. Dig.*, 460; 16 *Serg. & Rawle*, 375; 3 *Salk.*, 203.

5. The remedy by *mandamus* in this case is proper. It is the appropriate remedy where a party has a legal right, and there is no other appropriate remedy; and where in justice there ought to be one; but not where discretion is granted: 1 *Cow.*, 423; 3 *Burr.*, 1265; 11 *Johns.*, 414; 19 *Wend.*, 118, 119, 120.

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People v. Judges of the Washtenaw Circuit Court.

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Now, the allowance or disallowance of amendments is not a matter for which error lies; 5 *Pet. Cond.*, 687; 1 *Pet.*, 168; nor is the refusal to quash an execution: 6 *Pet.*, 310; 2 *Pet. Cond.*, 127; nor a refusal to grant a new trial; 2 *Sum.*, 19; 2 *Day*, 368; 2 *Binney*, 80, 93; nor will it lie to an order staying proceedings in a court below: 2 *Pet. Cond.*, 618; nor on a refusal to grant a *venditioni exponas*: 6 *Pet.*, 648; nor to an order setting aside an injunction; 8 *Pet.*, 259; nor where a discretion has been exercised in receiving or rejecting pleas: 1 *Pet. Cond.*, 259; nor on refusal to continue a cause: 2 *Pet. Cond.*, 97; *Id.*, 172; 4 *Id.*, 427; to allow pleadings to be amended, or new ones filed: 2 *Pet.*, 347; 3 *Pet.*, 31; nor to re-instate a case after a new trial: 2 *Pet. Cond.*, 256. And, generally speaking, matters of practice in the inferior courts, do not constitute subjects on which errors can be assigned in an appellate court: 3 *Pet.*, 445; 6 *Com. Dig.*, 443; *Hardin*, 173.

The defendant, then, would be without remedy unless the court would interpose by *mandamus*.

This has been expressly held to be the appropriate remedy at common law in similar cases: 1 *Cow.*, 15; 5 *Wend.* 125; 1 *Id.*, 299; 1 *East.*, 686; 10 *East.*, 404.

The remedy is given by our statute, *S. L.* 1843, *p.* 70, § 12; and it has been the policy of our legislature to reserve all doubtful questions for determination by the Supreme Court: *S. L.* 1840, *pp.* 18, 19, § 3; *S. L.* 1842, *p.* 21.

*William A. Fletcher, contra:*

The plaintiffs had a right to file the second amended declaration under the 27th rule of court.

The provision of that rule, that "new counts or pleas may be added," on amendment of declarations or pleas

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People v. Judges of the Washtenaw Circuit Court.

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under the rule, gave the right to count in the amended declaration, upon new causes of action, in as clear and express terms, as it gave to the defendant the right to add a new plea, setting forth a defense entirely different from that in his former plea. The cases cited by the counsel for the relator to this point, do not apply here. No rule similar to that above referred to has ever been adopted by the English courts. Nor was it adopted in New York until 1830, after the decisions cited from that state were made: *Grah. Pr.*, 653; 2 *Wend.*, 259. Neither has it been in force in any of the other states from which decisions are cited. The question here is, simply, what is the proper construction of the 27th rule? There is no ground for the distinction contended for between penal and other actions; for the rule applies to all actions.

Counts in debt for money had and received may be joined with counts founded on the statute: *R. S.*, 161, § 7; 1 *Com. Dig.*, 221, *G. 1*, and cases there cited; 1 *Ch. Pl.*, 180; *Gould's Pl.*, 210, 219. In this case the plaintiffs had an action of debt at common law, to recover of the defendant the excess above the legal interest. Their right of action, therefore, growing out of this transaction, did not depend upon the statute. They had a right of action independent of the statute. The statute gave the right to the plaintiffs to recover threefold the excess above the interest; and the original declaration was for the penalty. Why might not the plaintiffs join a cause of action for the excess above the interest, with a count for the penalty?

*Mandamus* is not the proper remedy in this case. The statute, *S. L.* 1843, *p.* 170, § 12, does not give it, because the decision sought to be reviewed, is not of a question addressed to the *discretion* of the court. It can be resorted to at the common law, only where there is no other remedy. And the statute of this state gives another remedy, to wit, by bill of exceptions, and writ of error: *R. S.*, 383,

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*People v. Judges of the Washtenaw Circuit Court.*

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§ 16. The counsel entered into a critical examination of the provisions of this statute, for the purpose of showing that, under it, exceptions might be taken to the decision now sought to be renewed by *mandamus*. He also reviewed in detail the several decisions cited on behalf of the relator for the purpose of showing that the only remedy in this case was by *mandamus*.

WHIPPLE, J., delivered the opinion of the court.

The first ground assumed by the counsel for the relator is, that the second amended declaration was irregularly filed, and that the motion to set the same aside should have been granted by the Circuit Court. Whether this position be sound or not, must depend upon the construction of the 27th general rule prescribed by this court for regulating the practice at the circuit. That rule is as follows: "The plaintiff may at any time before the default for not replying shall be entered, if the plea shall be a special plea, or a plea in abatement, or within ten days after service of a copy of the plea if it shall be the general issue, amend his declaration. After plea, either party may, before default for not answering shall be entered, amend the pleading to be answered; and when there shall be a demurrer to a declaration or other pleading, such pleading may be amended at any time before the default for not joining in demurrer shall be entered. The respective parties may amend under this rule, of course, and without costs, but shall not be entitled so to amend more than once. Under this rule, new counts or pleas may be added."

Had the plaintiffs, then, a right to file the *second* amended declaration, *as of course*, under this rule? The first amended declaration was filed under the special order of the court granting leave to the parties to file new pleadings under the rules of the court; that is to say, the plaintiffs

People v. Judges of the Washtenaw Circuit Court.

had leave to file their amended declaration within sixty days, and the defendant had thirty days to plead thereto. Could the plaintiffs, then, after a demurrer was interposed to their amended declaration filed under the special order, amend of course, under the general rule? I think the rule will not admit of such a construction. In this case, the plea of the general issue was pleaded to the original declaration, a trial was had, and a verdict rendered in favor of the plaintiffs, which was subsequently set aside, and a new trial granted. At this stage of the proceedings, the special order allowing new pleadings was made, and the 27th general rule ceased to operate; all further pleadings were to be regulated by the special rule; neither party could refer to the general rule for conducting them; that rule had no application to the case. This, I think, will appear manifest by a careful examination of the rule itself, without reference to the practice under it. The rule provides that the plaintiff may amend his declaration of course, before default is entered: 1. Where a special plea is filed; 2. Where a plea in abatement is filed; and, 3. Where a demurrer is filed. It also provides that a declaration may be amended, in the event that the general issue is pleaded, provided the amendment is made within ten days after service of such plea. With reference to the right of the plaintiff to amend when the general issue is pleaded, the rule may be construed to read thus: "The plaintiff may amend his declaration once of course within ten days after service of a copy of a plea, if it be the general issue." In this case, the general issue was pleaded to the original declaration; and the right of the plaintiffs to amend, existed, provided such amendment was made within ten days after the service of the plea. The plaintiffs, however, did not avail themselves of this right, but proceeded to the trial of the cause, and obtained a verdict. This being so, their right to amend under the

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People v. Judges of the Washtenaw Circuit Court.

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27th rule became extinguished; that rule had no further application to the case. After a case is taken out of the operation of the *general rules* for regulating the pleadings in a cause, I think the 27th of those general rules, ceases to apply to it, and the party is bound to proceed under the *special rule* that may have been made, and be guided by it. In the case before us, the plaintiffs, under the special order of the court, availed themselves of their right to file an amended declaration. To that declaration a demurrer was interposed; and, if they desired further to amend, a special application for that purpose should have been made to the court, and a special order obtained. They could not file an amended declaration under the special order of the court, and amend *of course*, under the general rule. That rule was evidently intended to apply only to cases where the pleading amended was filed under the general rules of the court. If this be its true construction, it follows, that the rule has reference, exclusively, to amendments to be made after the return of process, and before the action of the court has been had upon the pleadings. Suppose the defendant, instead of filing the plea of the general issue to the original declaration, had demurred, and that the demurrer had been sustained, with leave to the plaintiffs to amend—will it be contended that, upon demurrer to the amended declaration, the plaintiffs would have had the right to amend *of course*? I apprehend not. After the action of the court upon the pleadings, the right to amend must be derived from some special rule made in the particular case, and not from the general rule, which has ceased to have any application. Such, according to my understanding, has been the practice under the rule. I have never known the right to amend under the 27th rule allowed, except under the circumstances I have stated.

But a more serious question arises upon the return made by the Circuit Court. It is insisted by the counsel in

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People v. Judges of the Washtenaw Circuit Court.

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behalf of the relator, that, admitting the right of the plaintiffs to file the second amended declaration, yet, this right did not authorize the filing of a declaration embodying a new and distinct cause of action. Both the original and amended declarations were in debt, to recover the penalty for usury under the statute: *R. S.*, 161, § 7. The last declaration filed contains three counts, for *money had and received*. Can the plaintiffs thus abandon their original cause of action, and substitute another, differing in form, substance and fact? "Amendments are either at common law or by statute. At common law there was very little room for amendments:" 1 *Tidd's Pr.*, 697. By the English statute of amendments, the declaration may be amended in *form or substance*. "In the King's Bench, the plaintiff was not formerly allowed to add a new count to his declaration, under pretense of amending it, after plea pleaded, or after the end of the second term from the return of the writ." "It is now the practice, however, in the King's Bench, to permit a new count to be added after the end of the second term, when the cause of action is substantially the same, though not for a different cause of action." In the Common Pleas, the course of the court formerly was, that the plaintiff might, at any time before the end of the second term, have leave to amend his declaration, by adding new counts, but not afterwards; at present, however, it is not an invariable rule in that court, that a new count shall not be added after the second term. The principle of the rule is, that, as the plaintiff would have been out of court at the end of the second term, if he had not declared at all, so the court will not suffer him to declare upon a fresh cause of action, after the time has elapsed; but when the cause of action is *substantially the same*, a new count may be added. Therefore, when the plaintiff, having obtained leave to amend a count in his declaration, added new counts, which contained no new

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People v. Judges of the Wahtenaw Circuit Court

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cause of action, but only varied the manner of stating that which was demurred to, the Court of Common Pleas would not order them to be stricken out." 1 *Tidd's Pr.*, 698-9. Such seems to be the practice in the King's Bench and Common Pleas, on the subject of amendments. The practice, under the English statutes, may be thus stated: 1. Declarations may be amended either in *form or substance*. 2. New counts may be added, when the cause of action is substantially the same, though not for a different cause of action. 3. Where a declaration is demurred to, and leave to amend is granted, the plaintiff may add new counts, varying the manner of stating that which was demurred to.

I propose now to examine a few of the very many adjudged cases, both in England and in this country, on the subject of amendments. In the case of *Maddock v. Hammet*, 7 *T. R.*, 28, it seems that a rule had been obtained calling on the defendants to show cause why the declaration, which was in an action for usury, should not be amended by altering the times of payment of certain notes in which the charge of usury was alleged to consist. It was admitted that the statute of limitations had run, so that no new action could be commenced. Lord Kenyon, C. J., remarking that, "inasmuch as the amendment prayed for, was not to introduce a new substantive cause of action, but merely to rectify a mistake in setting out the notes," permitted the same to be made. In the case of *Dover v. Mestaer*, 4 *East.*, 435, an application was made to amend the declaration in a penal action. Lord Ellenborough, C. J., remarked that, "if it had never been determined that any amendment could be made in penal actions, after the time for bringing a new action was out, he should have doubted the propriety of allowing such an amendment for the first time," etc. Lawrence, J., said that, "the line which had been drawn in the former cases,

People v. Judges of the Washtenaw Circuit Court.

is, that where there has not been any unnecessary delay on the part of the plaintiff in the prosecution of a penal action, the court will allow of an amendment as in other cases, the cause of action being in truth the same."

These authorities sustain the views laid down, both by Tidd and Archbold, and are deemed entirely sufficient to show the English rule in respect to amendments.

A reference to a few American authorities will now be made. In the case of *Caswell v. Cooke*, 8 *Serg. & Rawle*, 268, the court say, that "the power of the courts under the act of 25th March, 1806, is not confined to mere alterations of form, but, in its terms, extends to every informality which will affect the merits of the cause in controversy ;" and that "the true criterion is, whether the alteration or proposed amendment is a new and different matter—another cause of controversy ; or, whether it is the same contract or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with his proof, and the merits of the case."

In the case of *Hayne v. Morgan*, 3 *Mass.*, 208, Parsons, C. J., makes use of this language: "By the statute of 1784 a general power is given to the court to order amendments on motion, without limiting the discretion of the court, as to the nature of the amendment, or the terms on which it may be ordered. The court have heretofore considered that an amendment, by which the plea was changed, as to alter a plea of the case to a plea of debt or trespass, was not within their discretion ; for then it would be a different action." "So, to file a new declaration for a new cause of action, not contained in any of the original counts, has been refused. But all amendments of declarations, consistent with the nature of those originally made, and for the same cause of action, are within the statutes."

In *Vancleef v. Therasson*, 3 *Pick.*, 12, it appears that

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People v. Judges of the Washtenaw Circuit Court.

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the action was *assumpsit*, to recover the price of forty firkins of lard. At the trial the plaintiff proved the sale and delivery, but it appeared that a negotiable note had been given by the defendant, at the time, payable in four months, etc., whereupon, the plaintiff moved for liberty to amend his writ, by inserting a count on the note; but the amendment was not allowed. Parker, C. J., in giving the opinion of the court, remarked that, by the decisions of the court, "the amendment could not be allowed; for the note and the account *were substantially different causes of action.*" The rule in Massachusetts is again stated by Parker, C. J., in the case of *Ball v. Chaflin*, 5 *Pick.*, 304. He says, "the new count offered, under leave to amend, must be consistent with the former count or counts; that is, it must be of the like kind of action, subject to the same plea, and such as might have been originally joined with the others. It must be for the same cause of action; that is, the subject matter of the new count must be the same as of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing." In the case of *Currie v. Tibbs' Heirs*, 5 *Monroe*, 540, the court say, that "no amendment ought to be allowed, which changes the old controversy into an entirely new suit;" although, in Kentucky, amendments are liberally indulged under the practice in that state. In *Drake v. Watson*, 4 *Day*, 37, the court decided that "an amendment will not be allowed in an action *qui tam*, to recover the penalty for an offense, which, at the time of making the motion, was barred by the statute of limitations." The action in that case was upon the statute of usury. The same doctrine is held in 2 *T. R.*, 707, and 6 *T. R.*, 171.

The cases cited show very conclusively that, under the statutes of amendments, the rules of decision in England and in this country have been uniform and identical.

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People v. Judges of the Washtenaw Circuit Court.

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They establish, I think, beyond controversy, the principle that an amendment will not be permitted, which would, in effect, amount to a permission to bring another action. In the present case an attempt is made to change an action, originally brought to recover a penalty under the statute of usury, into an ordinary common law action for money had and received. This the statute never contemplated; and this the 27th rule does not sanction. Both the statute and the rule are liberal in their provisions, but not more so than the statutes of Pennsylvania or Massachusetts; and they must be construed to intend, that, while courts are to apply, with great liberality, the provisions of both, by permitting amendments by the addition of new counts, or otherwise, yet, the amendments must be such as are consistent with the cause of action described in the declaration to be amended, and not the substitution of a new cause of action. The object of the statute of amendments being the obtainment of substantial justice, unembarrassed by mere form, I think that object can be best attained by adhering to the rule laid down by the Supreme Court of Pennsylvania, in the case of *Caswell v. Cooke*, 8 Serg. & Rawle, 268, and permitting parties to amend, so as to lay the contract or wrong in a different manner, as will best suit the proof, by not permitting a new cause of action to be introduced by an amendment.

But there are other difficulties in the way of permitting the amendment in the present case. An action founded upon a statute cannot be joined with an action at common law: 1 Com. Dig., 222, G. 1; 16 Serg. & Rawle, 375. If this be true, I am unable to perceive how a party can abandon an action based exclusively on a highly penal statute, and substitute the common law action for money had and received. The action of debt, it is true, will lie in both cases. In the first case, the remedy by action of

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People v. Judges of the Washtenaw Circuit Court.

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debt, is given by statute, and sounds in contract, but the thing to be recovered is for a wrong. In the second case, the action not only sounds in contract, but the thing recovered is for a breach of an *implied agreement*. Can a party, then, abandon an action of debt to recover a *penalty*, and substitute for it an action of debt for money had and received, or upon an implied undertaking? I apprehend not.

The next question to be considered is, whether the remedy by *mandamus* is appropriate. We are not disposed to extend this remedy further than is warranted by the previous decisions of this court, in which we have uniformly held that a *mandamus* will not be awarded in cases where another remedy is provided by law.

In the present case, it is contended by the counsel for the respondents, that the appropriate remedy for the error complained of, was by writ of error, founded on exceptions taken to the opinion of the court below. This argument is founded on the following provision of our statute: "Any party aggrieved by any opinion, direction or judgment of any Circuit Court, in any civil suit or action, when a writ of error shall lie to remove a judgment therein to the Supreme Court, may allege exceptions thereto, which being reduced to writing and presented to the court, before the adjournment thereof without day, and being found conformable to the truth, shall be allowed and signed by the judges of the court, and, on being filed, shall make a part of the record in the cause, if the party alleging such exceptions shall elect." *R. S.*, 383, § 16.

The motion to strike out the second amended declaration, and the decision of the court upon that motion, would not constitute a part of a common law record; and the only question is, whether the motion and decision thereon, constituted a proper subject for exceptions, under the statute, so as to make them a part of the record in the cause.

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People v. Judges of the Washtenaw Circuit Court.

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Our statute is taken from a similar one found in the laws of Massachusetts, and has long since received a judicial construction by the Supreme Court of that state. In the case of *Haynes v. Morgan*, 3 Mass., 208, Parsons, C. J., said: "The defendant files his exceptions to an order of the judges, made in the course of the trial, granting the plaintiffs leave to amend their declaration without the payment of costs. The former part of the 5th section of the act authorizing exceptions, provides, that any party aggrieved at any opinion, direction or judgment of the justice, in any action or process, may allege exceptions to the same, at the term of the said court when such opinion, direction or judgment shall be given. By the latter part of the same section, power is given to the court to enter judgment when it shall appear that any exceptions made *in or after* the trial, are immaterial, or intended for delay. Taking the whole section together, it is manifest that exceptions may be made for any causes arising during the trial, or from the rendition of judgment; *and not for causes arising from any order of the court made in a cause preparatory for trial*. An order for amending a declaration, although it may happen to be moved for during the trial, yet, as it may be made at any time before the trial, is not a cause for filing exceptions."

The usual office of a bill of exceptions is to enable a party to avail himself of exceptions taken to "any opinion, direction, or judgment" of a court *during the trial of a cause*; and it would certainly be a novelty in practice, to tender a bill of exceptions to a court, embodying the "opinion, direction, or judgment" of the court upon a motion to strike from the files a declaration for irregularity.

In the case before us, whether the motion to strike out the declaration, should, or should not have been granted, depends upon the construction of the 27th general rule. It was a motion not addressed to the discretion of the

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*Dousman v. O'Malley.*

court. The rule, until rescinded or altered, was the law by which the motion was to be determined. And, as the judgment of the court upon that motion would not appear in a common law record, and was not the subject of an exception under the statute, it would seem that the remedy by *mandamus* is the only one by which that judgment can be reviewed.

GOODWIN, J., having acted as counsel for the relator before he took his seat upon the bench, did not participate in the decision.

*Mandamus granted.*

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*Dousman v. O'Malley.*

Where the statute requires that process should be served a certain number of days before the return day, both the day of service and the day of return must be excluded, in the computation of the time; the latter being excluded by the terms of the statute, and the former by the rule of construction provided by R. S. 2, § 2, subd. 11. (a)

This suit was commenced by attachment returnable to the Michilimackinac Circuit Court. On the 29th day of March, Dousman, the plaintiff, was served with a citation, under the provisions of the statute (*S. L.* 1840, *p.* 53), to appear before an associate judge of that court, on the 1st day of April (then) next, at 9 o'clock A. M., and show cause why the attachment should not be dissolved. He appeared, and objected that the citation was not served upon him three entire days before the return day thereof. The objection was overruled; and the judge proceeded to exercise jurisdiction, and dissolved the attachment. Whereupon, the plaintiff brought the proceedings before this court by *certiorari*.

*H. T. Backus*, for the plaintiff.

*H. H. Emmons*, for the defendant.

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(a) See *Salles v. Ireland*, 9 Mich., 104; *Arnold v. Nye*, 28 Mich., 286.

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Walbridge v. Spalding.

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RANSOM, C. J., delivered the opinion of the court.

The act of March 16, 1840 (*S. L. 1840, p. 53*), under which the proceedings to dissolve the attachment were had, requires that the citation shall be served three days, at least, *before* the return day thereof. By the terms of this act, the return day is excluded in the computation of time. The Revised Statutes provide that, "in the construction of the statutes of this state," "any specified number of days shall be construed to mean entire days:" *R. S., 3, § 3, subd. 11*. This rule of construction would exclude the day of service, that being but the fraction of a day; and, but two entire days having intervened, between the day of service and the return day of the citation, the service was clearly insufficient. The judge erred, therefore, in taking jurisdiction, and dissolving the attachment, and the judgment rendered by him must be reversed.

*Judgment reversed.*

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### Walbridge v. Spalding.

The bond required to be executed by a non-resident plaintiff in attachment, his *agent or attorney*, prior to the issuing of the writ (*S. L. 1842, p. 118, § 3*), may, when executed by such agent or attorney, be, in form, his personal obligation, and be executed by him in his own name, describing himself as such agent, and not in the name, nor on behalf of his principal, the plaintiff in the attachment.

Such bond is not vitiated by the omission, in the body of it, of the christian name of the principal obligor, he having executed the same by his full name.

Where such bond is not in the name of the plaintiff in the attachment, but is the personal obligation of his agent, no power under seal need be shown, authorizing its execution by the agent.

Case certified from the Lenawee Circuit Court. This suit was commenced by writ of attachment against the

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Walbridge v. Spalding.

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property of the defendant. The plaintiffs were non-residents of this state. The statute (*S. L.* 1843, *p.* 118, § 3), provides that no attachment shall be "issued at the instance of any person not a resident of this state, at the time of issuing thereof, until a bond shall have been executed by him, *his agent or attorney*, in the penal sum of five hundred dollars, with at least two sufficient sureties, to be approved by the clerk of the court in which application for such attachment shall be made, conditioned to pay all the costs and damages of suit, if the plaintiff shall fail to recover against the defendant." The bond filed in this case was executed by Charles W. Hill, with two sureties, and reads thus : "We, —— Hill, agent of George B. Walbridge and Albert Hayden, as principal, and Albert M. Baker and Charles K. Backus as sureties, are held and firmly bound," etc.; Hill binding himself personally, and not his principals, and his Christian name being left blank in the body of the instrument.

The defendant moved the Circuit Court to quash the attachment on the ground : 1. That the bond must be executed by the principals, in person, or by their attorney, in their names and behalf; and, 2. That the omission of the christian name of Hill in the body of the bond rendered it insufficient.

*A. K. Tiffany*, for the motion.

*Baker & Millerd*, contra.

GOODWIN, J., delivered the opinion of the court.

It will be perceived that the bond is within the letter of the statute, being executed by the agent of the plaintiff, so described on the face of the instrument. But it is insisted that the proper construction is, that it must be executed by an attorney or agent, for and in the name of the party, as the bond of the party, and not of the agent or

*Walbridge v. Spalding.*

attorney. Such is not the language of the statute; nor is there any thing in the act, or its objects, which shows such to have been the intent; or any reason for departing from the plain literal construction. This provision is made in respect only to non-residents of the state. There seems to be good reason in such case to permit a bond to be executed by the agent personally, who is present, and who may not be furnished with a power to execute sealed instruments for his principal, and who may yet be authorized to resort to the requisite legal process to collect the debt. And hence, probably, the language of the section referred to. In the preceding section of the same act, the legislature, in providing for a bond in a different case of a foreign corporation defendant, use different language, and require that, "the defendant, by his duly authorized agent or attorney, shall give bonds." If, in the third section, they designed to require the party to execute the bond, why use the words agent or attorney at all? For, the bond executed by the authorized agent or attorney, would be the bond of the party; or, why not adopt like language to that used in the preceding section?

The object of the bond is security for damages and costs. And this certainly is as well, at least, effected by the bond of the agent or attorney, who is generally a resident (with securities), as by that of a non-resident.

Reference is made to the chapter in the Revised Statutes relative to courts of justices of the peace, and also the act of 1841, relative to those courts, in which, on an appeal to the Circuit Court, *the party, his agent or attorney*, is required to enter into recognizance; and when, in the Circuit Court, judgment is rendered against the appellant, it may, on motion, be rendered also against the surety on the appeal; and it is insisted that, from these provisions, the legislature, in thus using those words, intended that the agent or attorney should execute in the name of, and

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Walbridge v. Spalding.

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bind the principal; and that, therefore, in the section under consideration, in the use of the same words, the same design is to be presumed. If, in the provisions of laws on a different subject entirely, the legislature have, in one section, by a particular provision, controlled and limited the meaning of the general phraseology of another, it is not perceived by what rule the like limitations should, by construction, be applied to other laws, on other subjects wholly disconnected; especially, when, in the statute to which such construction is sought to be given, the legislature have, in another and immediately preceding section, on a like topic, so worded the phraseology, as in the first and second sections of the act under consideration. This change cannot be considered accidental, but the reverse: *Dwarris on St.*, 706-7.

As to the omission, in the body of the bond, of the Christian name of Hill, he having executed by his full name, this certainly cannot vitiate the instrument. It would, notwithstanding, be held the bond of Hill, on a plea of *non est factum*.

It was insisted, also, that a power under seal should be shown, from the principal, to execute the bond. This would be necessary, if the bond was in the name of the principals, so as to make it their bond. It appears on the proceedings in the Circuit Court, that Hill was the agent of the plaintiffs for suing out the writ of attachment. This is sufficient.

On the points presented, it should be certified to the Circuit Court, as the opinion of this court, that the motion should be denied.

*Certified accordingly.*

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Atwater v. Streets.**Atwater v. Streets.**

It is not necessary that a copy of the protest of a foreign bill should accompany the notice of its dishonor.

Question reserved and certified from Berrien Circuit Court. *Assumpsit* against the defendants as indorsers of a bill of exchange for \$200, drawn in this state, upon a person residing in the state of New York, and payable at the Bank of Buffalo, in that state. Plea, *non assumpsit*.

On the trial of the cause, the plaintiffs read in evidence the certificate of a notary public, under his notarial seal, of the presentment, protest and notice of dishonor of the bill; but did not prove that any copy of the protest was sent, with the notice, to the defendants. A verdict was found for the plaintiffs for the amount of the bill. Afterwards the defendants moved to set aside the verdict, and for a new trial, and the presiding judge reserved for the determination of this court the question arising upon the motion, of whether, in such a case, it was necessary that a copy of the protest should be sent to the indorsers, with the notice of dishonor.

*Green & Dana*, for the plaintiffs.

*N. Bacon*, for the defendants.

FELCH, J., delivered the opinion of the court.

Under the decisions of the Supreme Court of the United States the bill of exchange declared on must be considered a foreign bill: *Townley v. Sumrall*, 2 Pet., 179.

A protest of such a bill is necessary to charge the indorser; and such protest must be proved at the trial. Notice of the dishonor of the bill must also be given to the

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*Atwater v. Streets.*

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indorser ; but must the notice be accompanied with a copy of the protest ?

Notice of the due presentment of the bill, and refusal of payment, is, in general, sufficient ; but when the indorser is abroad, or out of England, the English authorities require something more to be done. The rule there laid down does not, however, go so far as to require a *copy* of the protest to accompany the notice. Thus, the rule is stated in *Chitty on Bills*, 498, to be, in such case, that a copy of the protest, or *some other memorial* must, within a reasonable time, be sent, with a letter of advice or notice of dishonor, to the person sought to be charged. And, in *Bailey on Bills*, 259, 4th ed., it is said that in some cases a copy or *some other memorial* of the protest should accompany the notice. No English case is found which decides that such copy is indispensable ; while, in *Goodman v. Harvey*, 4 *Adol. & Ellis*, 870, the question was directly raised, and the objection for the want of such copy overruled.

In *Thompson on Bills*, 505, 506 and 507, as cited in a note in 10 *Mass.*, 5, the English and Scotch rule is clearly and concisely stated thus : "It is not now held necessary that notice should be accompanied by the bill, or by the principal, or a copy of the protest, even in the case of a foreign bill. It does not even seem requisite to mention that there has been a protest, when the person receiving the notice is in this country at the time of the dishonor ; as he may, in that case, ascertain this fact, although it should not be notified to him. But if he is abroad, the fact of a protest having been taken, ought to be mentioned in the notice, since he cannot otherwise be supposed to be aware of it. If he afterwards require a copy of the protest it must be sent to him."

In this country, the question has several times been the subject of remarks by elementary writers, and of adjudic-

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*Farmers & Mechanics' Bank v. Troy City Bank.*

cation by courts of law. Chancellor Kent, in his commentaries, 3d vol., 109, expressly declares that no copy need accompany the notice. In *Lenox v. Leverett*, 10 Mass., 1, it was held that the protest need not be sent with the notice. So, also, in *Wallace v. Agry*, 4 Mason, 336, neither the protest nor a copy of it was deemed necessary. So in *Wells v. Whitehead*, 15 Wend., 527. These adjudications were each upon a state of facts as to residence, similar to the case before us. And, in *Story on Bills*, 339, it is laid down as settled law in this country, that the notice need not be accompanied by a copy of the protest; it is sufficient for the notice to state that the bill has been protested, and to produce the protest at the trial.

The question reserved must, then, be answered in the negative; and so it must be certified to the court below.

*Certified accordingly.*

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**The Farmers & Mechanics' Bank of Michigan v. The Troy City Bank.**

A judgment will not be reversed, on error, because no warrant of attorney authorizing the prosecution of the suit appears in the record, even where the plaintiff below was a corporation.

The practice of giving, or filing such warrants of attorney has never prevailed in this state.

On plea of general issue to an action by a corporation, the plaintiffs must prove their corporate existence in the same manner as though *nul til corporation* were pleaded. (a)

Where it was assigned for error, that the plaintiffs below, who sued as a foreign corporation, did not prove themselves such by legal and competent evidence, and, their charter not being set forth in the bill of exceptions, the court was unable to determine whether the evidence (which was an exemplified copy of their charter, and proof of acts of user under it) was sufficient or not; it was held, that, in support of the judgment, the evidence would be presumed sufficient.

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(a) Affirmed: *Owen v. Bank of Sandstone*, 2 Doug., 134.

**Farmers & Mechanics' Bank v. Troy City Bank.**

So much of the "act to organize and regulate banking associations" (*S. L. 1837*, p. 76) as purports to confer corporate rights upon the associations organized under its provisions, being unconstitutional and void (*Green v. Graves*, *ante* 251), such associations are not *moneyed corporations*; and, therefore, are not within the provision of the safety fund act (*S. L. 1836*, p. 165, § 31), which prohibits such corporations from issuing their bills or notes, unless the same be made payable on demand without interest.

*Quere*, whether a bill of exchange, drawn by an association organized under the general banking law, acting as a corporation, could be treated as legal and valid, and an action maintained upon it against the acceptors.

A bill of exchange directed to "John A. Welles, Cashier Farmers & Mechanics' Bank of Michigan," and accepted by writing across the face thereof, "Accepted, John A. Welles, Cashier," is drawn upon, and accepted by the bank, and not by Welles in his individual capacity.

The extent of the general powers of the cashier of a bank, is a question of law, and not of fact; and a charge is erroneous, which refers it to the jury to determine whether a cashier, as such, had power to accept certain bills for the bank. (b)

The cashier of a bank has no power to accept bills of exchange, on behalf of the bank, for the accommodation, merely, of the drawers; and the holder, with notice, of bills so accepted, cannot recover against the bank.

It seems that persons dealing with a bank, are presumed to know the extent of the general powers of a cashier.

Error to Wayne Circuit Court. This was an action of *assumpsit*, brought by the defendants in error, against the plaintiffs in error, as acceptors of two bills of exchange, in all respects alike, of each of which the following is a copy :

"\$6,000.      *Farmers' Bank of Homer*, Aug. 5, 1838.

"Four months after date, pay to the order of S. K. Stowe,  
at the Troy City Bank, six thousand dollars.

(Signed)                          "A. FINCH, JR., Cash.

"To JOHN A. WELLES,

"*Cashier Farmers & Mechanics' Bank of Michigan.*

(Indorsed) " S. K. STOWE. Across the face of each bill was written : Accepted, JOHN A. WELLES, Cashier."

The declaration contained two special counts upon each

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(b) Affirmed: *Peninsular Bank v. Hanmer*, 14 Mich., 208, 214; see 4 Mich., 606.

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Farmers & Mechanics' Bank v. Troy City Bank.

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bill, and also the common money counts. The plea was the general issue. The cause was tried before the Hon. Geo. MORELL, Presiding Judge, at the May term, 1841, of the Circuit Court.

It appeared from the bill of exceptions in the case, that, on the trial, the plaintiffs below, to prove that they were a corporation, read in evidence a certified copy of their charter (which, however, was not set forth in the bill of exceptions), and called a witness, who was asked whether he was acquainted with acts of *user* on the part of the plaintiffs below, under their charter. To this question the counsel for the defendants below objected, on the ground that it was incompetent for the plaintiffs below to prove such acts of *user* until they had shown a compliance with the conditions and requirements which the charter prescribed for their organization under it. This objection was overruled ; and the witness testified that he had been acquainted with the corporation called the Troy City Bank, ever since 1833 ; that it had had its banking house in the city of Troy, in the state of New York, ever since that time, and had been doing a regular banking business, had its cashier, president, directors, etc., and that no other bank of that name ever existed in that city.

It was admitted that the Farmers' Bank of Homer was a banking institution, organized and in operation under the general banking law of this state.

The plaintiffs below proved the indorsement of the bills to them by the payee ; that the acceptances written across the face of the bills, were in the handwriting of John A. Welles ; and that he was cashier of the defendants below at the time when they were made ; they then read the bills in evidence, and rested their case.

The defendants below moved the court to nonsuit the plaintiffs, on the ground that they had not proved them-

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*Farmers & Mechanics' Bank v. Troy City Bank.*

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selves a corporation by legal and sufficient evidence. The court overruled the motion: to which decision the defendants below excepted.

The defendants below introduced evidence in defense tending to prove that the bills of exchange were accepted by Welles, as their cashier, without consideration, and solely for the accommodation of the drawers, and that this was known to the plaintiffs below when they received them; that the acceptances were made by Welles, without the knowledge of, and without authority from the directors of the Farmers & Mechanics' Bank of Michigan (the defendants below); and that said directors never approved, recognized, or adopted the acceptances as their own.

Rebutting evidence was introduced by the plaintiffs below, tending to prove a subsequent recognition, and adoption, by said directors, of the act of Welles in accepting the bills.

The evidence being closed, the court charged the jury, among other things, that the proper construction, upon their face, of the bills of exchange, was, that the defendants below, through their agent, John A. Welles, as their cashier, accepted them; that the legal intendant was, that the acceptances came within the delegated power of Welles, as cashier; that *prima facie* they did so, because the law presumes that the cashier acts within the limits of his delegated power until the contrary is shown.

The court further charged, that, if the jury should be of opinion that the acceptances were made by Welles in his individual capacity, they would find a verdict for the defendants below; that, if he accepted on behalf of the bank, of which he was cashier, and if such an act came within his general authority or power as cashier, then they would find for the plaintiffs below; and if it was not within his general power, then, if the directors of the said

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Farmers & Mechanics' Bank v. Troy City Bank.

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bank recognized, adopted or approved of the act of Welles, in this particular, the plaintiffs below were entitled to their verdict; otherwise not.

The counsel for the defendants below requested the court further to charge the jury, that, if they believed that the drafts were drawn by the Farmers' Bank of Homer, for their own accommodation—that Welles accepted them, as cashier, for the accommodation of the drawers—that the plaintiffs had notice of these facts—and that the directors of the Farmers & Mechanics' Bank never approved, recognized, or adopted, as their own, the acceptances of Welles—then their verdict, in such case, must be for the defendants.

The court refused so to charge, but instructed the jury that, if they believed that Welles had not the *general power* to accept, and that the directors of the bank never adopted, approved or recognized, as their own, the acceptances of Welles, their verdict must be for the defendants.

To the charge given by the court, and to the refusal of the court to charge as requested, the defendants below excepted; and, a bill of exceptions having been tendered and signed, removed the cause into this court by writ of error.

Several errors were assigned; such as were considered by the court, sufficiently appear in the opinion.

*T. Romeyn and II. N. Walker*, for the plaintiffs in error:

The bills declared on were the acceptances of Welles, and not of the Farmers & Mechanics' Bank: *Story on Bills*, § 76; *Bayley on Bills*, 70, 71; *Chitty on Bills*, 33, 34; *Story on Ag.*, § 155; *Leadbitter v. Farrow*, 5 *Maule & Selw.*, 345; *Ducarr v. Gill*, 4 *Car. & Payne*, 121; *Thomas v. Bishop*, 2 *Str.*, 955; *S. C. Cas. Temp. Hardw.*, 1; *Barker v. Mechanics' Insurance Co.*, 3 *Wend.*, 98.

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Farmers & Mechanics' Bank v. Troy City Bank.

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It was incumbent on the plaintiffs below, to show that Welles had authority to accept the bills of exchange, so as to bind the defendants by his act: *2 Stark. Ev.*, 31; *Id.*, 144; *3 T. R.*, 757; *4 Bing.*, 149; *S. C.*, 13 *E. C. L. R.*, 383; *Chitty on Bills*, 28, 29.

The general power of the cashier of the defendants below did not extend to the acceptance of bills for the accommodation of others; and any contract of his beyond the scope of his duties as cashier was not binding on the defendants below. The following authorities show what are the general powers and duties of a cashier: *Ang. & Ames on Corp.*, 172, 173; *Story on Ag.*, 94, 95, 103, 104, 105; *Fleckner v. Bank United States*, 8 *Wheat.*, 360; *United States Bank v. Dunn*, 6 *Pet.*, 56, 59; *Bank of Metropolis v. Jones*, 8 *Pet.*, 13, 16; *Hallowell & Augusta Bank v. Hamlin*, 14 *Mass.*, 178, 181. These authorities all show that a cashier has no right to *create* new liabilities of the bank, of an extraordinary character, and without any consideration.

The extent of Welles's authority was known to the plaintiffs below. Persons dealing with corporations are bound to know the extent of their powers. This is especially so with regard to agents or officers of corporations: *Schimmelvapennick v. Bayard*, 1 *Pet.*, 290; *Hayden v. Middlesex Turnpike Co.*, 10 *Mass.*, 397, 403; *Salem Bank v. Gloucester Bank*, 17 *Mass.*, 29; *Wyman v. Hallowell & Augusta Bank*, 14 *Mass.*, 58, 63; *Snow v. Perry*, 9 *Pick.*, 542; *3 T. R.*, 757; *Seton v. Slade*, 7 *Ves.*, 276; *Gibson v. Colt*, 7 *Johns.*, 390; 15 *Johns.*, 44; *Smith's Mer. Law*, 59; *Comyn on Contr.*, 240; *Chitty on Contr.*, 57; *Theob. Pr. and Ag.*, 245; *Paley on Ag.*, 199, 200, 201, and notes.

The court erred in submitting to the jury, without instructions, the question whether the acceptance of the drafts was within the general powers of Welles, the cashier

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*Farmers & Mechanics' Bank v. Troy City Bank.*

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of the defendants below. This was strictly a question of law: *Story on Ag.*, 94, 95; 4 *Johns.*, 387, 389.

*James F. Joy*, for the defendants in error:

The bills were, on their face, drawn upon, and accepted by the defendants below: *Story on Ag.*, 143, 144, and cases there cited: 4 *Pet. Cond.*, 670.

Welles, as cashier, had power to bind the Farmers & Mechanics' Bank by the acceptances: *Story on Ag.*, 103, 18, 19, 115 to 121; 5 *Wheat.*, 326, 327; 1 *Pet.*, 46, 70; 8 *Wheat.*, 360; 6 *Cow.*, 460; 12 *Serg. & Rawle*, 260; 3 *Mason*, 505; 15 *Johns.*, 52; 2 *Pick.*, 14; 5 *Mason*, 189; 15 *Mass.*, 340. The law presumes that every man, in his official capacity, does his duty: 1 *Pet.*, 70; 21 *Pick.*, 490; 8 *Pick.*, 59, 60; 6 *Paige*, 503.

[The arguments of counsel are given only on a few of the more important points decided by the court. Several other important questions arose, some of them out of facts in the case, which the decision of the court renders it unnecessary to set forth in this report, and were very elaborately argued by counsel.]

**WHIPPLE**, J., delivered the opinion of the court.

The questions arising upon the record will be considered in the order in which they were presented to the court, in the argument of the counsel for the plaintiffs in error.

1. It is alleged as ground of error, that there is no authority in the record from the plaintiffs below authorizing the institution or prosecution of this suit

Anciently, attorneys were appointed orally in court, but were afterwards appointed out of court by warrant. It would seem, however, from an examination of the ancient authorities that the "default of a warrant of attorney was error:" 1 *Com. Dig.*, 574. But, for avoiding error, it is sufficient if the warrant be entered before judgment, or before writ of error brought: *Id.*, 747. It was

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*Farmers & Mechanics' Bank v. Troy City Bank.*

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always deemed sufficient that the authority to the attorney be given by writing upon the process, that such an one shall be his attorney: 1 *Sid.*, 31; 1 *Com. Dig.*, 746. And if the attorney appear, the court does not inquire whether he had a good authority: 1 *Salk.*, 86. It is also laid down that it is sufficient to say, that *A venit per B attornatum suum*: 1 *Com. Dig.*, 746. Our statute requires that the name of an attorney should be indorsed upon every original writ; and the writ, by the statute, constitutes a part of the record. This indorsement, taken in connection with the fact that the words, "the plaintiff, by his attorney, comes," etc., appear in the record, is, we think, sufficient. The practice of giving, entering and filing warrants of attorney, has never prevailed in this state. All that has ever been done in practice was to add the usual memorandum at the bottom of the declaration. This question was raised in the case of *Osborn v. Bank of the United States*, 9 *Wheat.*, 738, and the Supreme Court of the United States decided, that the want of a warrant of attorney constituted no ground for reversing the decree in that case, although a corporation was the plaintiff in the court below. I am inclined, therefore, for the reasons already given, and upon the reasoning of the Chief Justice in that case, not to consider the want of a warrant of attorney as error.

2. The second error assigned is, that the plaintiffs below did not prove themselves a corporation by legal and sufficient evidence. Inasmuch as the act incorporating them does not appear in the record in this case, it is impossible to say whether the proof was sufficient or not. The ground relied upon by the plaintiffs in error, in argument, was, that a corporation created by a statute, which requires certain acts to be done before it can be considered *in esse*, must show such acts to have been done, in order to establish its existence; and, hence, that the plaintiffs were

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*Farmers & Mechanics' Bank v. Troy City Bank.*

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bound to prove that they had complied with the conditions which their charter prescribed as precedent to their organization. It is well settled that, under the plea of the general issue, a corporation must prove all it would be required to prove under the plea of *nul tiel corporation*. If, therefore, under the latter plea, the plaintiffs would have been required to prove a compliance with certain conditions prescribed in the act of incorporation as precedent to their organization, it is clear that, under the general issue, the same measure of proof would be required. We have no doubt that the rule was correctly stated by counsel; but, whether the act incorporating the plaintiffs below would justify its application, we cannot know, as the act itself is not before us. It may be that the plaintiffs were declared a corporation by the act, and that nothing was required to be done *in futuro* to entitle them to corporate powers. If so, the proof upon the trial was sufficient to establish the corporate existence of the plaintiffs. We are not to presume that the evidence was insufficient. On the contrary, every reasonable presumption is to be made in support of the judgment. The second allegation of error, therefore, is not well taken.

3. The third error assigned, is, that the bills of exchange declared upon were illegal and void, having been issued in contravention of the safety fund act, which declares that no moneyed corporation subject to it "shall issue any bill or note of said corporation, unless the same shall be made payable on demand and without interest: S. L. 1836, 165, § 31. It was admitted on the argument, and appears by the record, that the Bank of Homer was a banking institution organized under the general banking law of this state, and subject to the safety fund act. The importance of this question was appreciated by counsel on both sides, and it was fully and ably argued. But a difficulty is here interposed, not known to counsel at the

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Farmers & Mechanics' Bank v. Troy City Bank.

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time the cause was argued, and which gives a new aspect to the question. I refer to a decision made by this court, since the argument, declaring so much of the act under which the Bank of Homer was organized, as purported to confer corporate rights upon the associations formed under its provisions, unconstitutional and void. The restriction in the safety fund act applies solely to *moneyed corporations*. But the Bank of Homer was not legally a corporation, and, therefore, not a moneyed corporation ; and, if not a moneyed *corporation*, then it was not subject to the restriction contained in the act.

It being settled that the Bank of Homer was not a moneyed corporation, and of consequence not subject to the provisions of the safety fund act, a question of great difficulty and importance might now arise, viz.: whether the bills of exchange declared upon could be treated as legal and valid, and a suit be maintained upon them. The magnitude of the interests involved in the decision of such a question, would preclude us from expressing an opinion upon it, until counsel be heard, and time taken for careful and deliberate examination. If the judgment of the court in the present case depended upon the decision of that question, we should reserve it for argument. As it is, we shall withhold the expression of any opinion upon it.

4. The fourth error assigned is, that the bills declared on are the acceptances of John A. Welles, and not of the president, directors and company of the Farmers & Mechanics' Bank of Michigan ; and, therefore, that the court erred in charging the jury that the proper construction of them upon their face was, "that the defendants [below], through their agent, John A. Welles, accepted the drafts in question."

The general rule in cases of contract is, that an agent, in executing his authority, must "do it in his name, who gives the authority." In other words, "to bind the prin-

*Farmers & Mechanics' Bank v. Troy City Bank.*

cipal, and to make it his contract, it must purport on its face to be the contract of the principal, and his name must be inserted in it, and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument." *Story on Agency*, § 147. This rule is adhered to with great strictness, in relation to the mode of executing instruments under seal. With respect, however, to unsolemn instruments, especially commercial and maritime contracts, the rule has, in this country at least, been somewhat relaxed. "In such cases, in furtherance of the public policy of encouraging trade, if it can upon the whole instrument, be collected, that the true object and intent of it are to bind the principal, and not merely the agent, courts of justice will adopt that construction of it, however informally it may be expressed :" *Id.*, § 154. An examination of the American cases confirms the proposition laid down by Judge Story, but I have in vain sought for an adjudged case in England, which gives support to the text. The English courts seem to have adhered pertinaciously to the rule, that, to bind his principal by a contract in writing, the agent must sign the name of the principal to the instrument; and no exception is made in favor of that class of contracts called commercial or maritime. And I think it may be well questioned whether sound policy would dictate to courts of justice the propriety of adopting the very liberal view which has been taken of this subject in some of the authorities referred to by the counsel for the defendants. It may admit of great doubt, whether it would tend to encourage trade, to give countenance to the "loose and inartificial manner" in which commercial contracts are usually drawn up. I do not mean to assert that in all cases, and under all circumstances, the rigid rules of construction adopted by the courts of common law in England, should be adhered to; yet I think it would be safer to adhere to these rules, than

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*Farmers & Mechanics' Bank v. Troy City Bank.*

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to adopt one so liberal in its terms, as to authorize courts of justice to indulge their fancy or caprice in giving a construction to contracts. The true rule may be thus stated: In cases where bills are drawn, accepted or indorsed, by an agent, if, from the nature of the contract and the terms of the instrument, it clearly appears that the party, by whom such bill is drawn, accepted, or indorsed, is an agent, and that he intended to bind his principal, he will be deemed to have contracted for such principal; but the terms of the instrument must be so explicit as to repel the inference that the agent intended to bind himself.

But, before applying this rule to the bills in question, it may not be improper to refer to a few cases decided in England and this country, for the purpose of showing that we do not intend to violate the spirit of the decisions to be found in the English reports, while it will appear that we are clearly within the rule laid down in the American authorities. In the case of *Thomas v. Bishop*, 2 *Strange*, 955, the bill was in the following form: "At thirty days' sight, pay to J. S., or order, £200, value received of him, and place the same to account of the *York Buildings Company*, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the *York Buildings Company*, at their house in Winchester street, London. Accepted 13th June, 1732, per H. Bishop." An action having been brought against the defendant on his acceptance, he proved upon the trial that the letter of advice was addressed to the company; and that, the bill having been brought to their house, he was ordered to accept it, which he did in the same manner as he had accepted other bills. The jury, however, were directed to find for the plaintiff, which they did accordingly. Upon motion for a new trial, the court held that the direction was right, for the reason that the bill, on its face, imported to be drawn on the defendant, and it was accepted by him *generally*, and not as

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Farmers & Mechanics' Bank v. Troy City Bank.

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servant of the company. The court further held, that as the action was by an indorsee, it would be of dangerous consequence to trade, to admit of evidence arising from extrinsic circumstances—as the letter of advice.

In *Leadbitter v. Farrow*, 5 *Maule & Selw.*, 345, the bill was as follows: “£50. Hexham, June 8, 1815. Forty days after date, pay to the order of Mr. Thomas Leadbitter fifty pounds, value received, which place to the account of the Durham Bank, as advised. Messrs. Wetherell, Stokes and others, bankers, London.” (Signed) “Christopher Farrow.” An action being brought against Farrow, he was held liable; Lord Ellenborough saying, that it was an universal rule, that a man who puts his name to a bill of exchange, thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procurement of another. In *Barker v. Mechanics' Fire Insurance Co. of the city of New York*, 3 *Wend.*, 94, the note was in the following form: “I, John Franklin, president of the Mechanics' Fire Insurance Co., promise to pay to the order of the Life and Fire Insurance Company, on demand, the sum of \$3,172.40, with interest, for value received. John Franklin.” It was decided that Franklin was liable, as it was his note and not the note of the company. In *Ballou v. Talbot*, 16 *Mass.*, 461, the note was as follows: “I, the subscriber, treasurer of the Dorchester Turnpike Company, for value received, promise,” etc., and it was signed “A. B., treasurer of the Dorchester Turnpike Co.” It was held to be the note of the corporation. In *The Mechanics' Bank of Alexandria v. The Bank of Columbia*, 4 *Pet. Cond.*, 666, it appears that the defendants in error brought *assumpsit* against the plaintiffs in error, on a check in the following form: “\$10,000. Mechanics' Bank of Alexandria, June 25, 1817. Cashier of the Bank of Columbia, pay to the order of P. H. Minor, Esq., ten thousand

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*Farmers & Mechanics' Bank v. Troy City Bank.*

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dollars. Wm. Patton, Jr." Upon the trial of the cause testimony was offered and received, going to show that the check was drawn under such circumstances, and in such a manner as justified the plaintiff in considering it as an official check; although it was insisted by the counsel on the part of the defendants that the character of the check could only be decided by the check itself, and that no parol testimony could be received to explain the same. A verdict and judgment having been rendered against the defendants, the cause was removed to the Supreme Court of the United States, which affirmed the judgment below. Mr. Justice Johnson, who delivered the opinion of the court, considered "that the evidence on the face of the bill predominated in favor of its being a bank transaction." I might here refer to numerous other cases, showing the course of decision upon a question of real difficulty, and in respect to which judges have entertained very different opinions; but enough have been cited to answer the purpose I have in view. Let us now examine these cases with reference to the case at bar.

In the case from 2 *Strange*, it is to be observed, that the bill was signed by the defendant *generally*; and in this particular it differs somewhat from the present case, the acceptance being by "John A. Welles, cashier." It may be said the acceptance by Welles was *general*, notwithstanding the addition of the word "cashier." But, whether such addition is, or is not, to give character to the instrument, must, I think, be determined from what appears upon the face of the bill, and other circumstances to which I shall presently allude.

In the case from 5 *Maule & Selw.*, it is difficult to perceive how the drawer could escape from the legal consequences of subscribing his name *generally* to the bill. The mere circumstance that the amount specified in the bill was directed to be placed to the account of the bank,

Farmers & Mechanics' Bank v. Troy City Bank.

could scarcely be deemed sufficient to overthrow the strong legal presumption arising from his having signed the bill *generally*. In the case from 3 *Wend.* the note was signed generally, and the words "President of the Mechanics' Fire Insurance Company" were clearly only descriptive of the person of the maker. I think the present case strikingly analogous to that reported in 16 *Mass.* The words, "accepted, John A. Welles, cashier," are equivalent to the words, "I, John A. Welles, cashier of the Farmers & Mechanics' Bank of Michigan, accept the within bill." The acceptance raises such implied promise to pay, and that promise is as complete and full, as though Welles had indorsed it in full on the bill.

It is difficult, if not impossible, to reconcile the decision of the Supreme Court of the United States, in the case of the *Bank of Alexandria v. the Bank of Columbia*, with principles which have been universally acknowledged, or with any adjudged case which has fallen under my observation. The only evidence on the face of the check, from which it might be inferred that it was a bank transaction, is, the circumstance that it purports to have been dated at the Mechanics' Bank. How the learned judge, who delivered the opinion of the court, could have come to the conclusion, "that the evidence on the face of the bill predominated in favor of its being a bank transaction," is to me inconceivable. We cannot recognize this case as authority, without disregarding the uniform course of decisions both in England and in this country. If the evidence received upon the trial was admissible, it might have justified the verdict. But how could evidence be admitted without violating the familiar rule, that matter *dehors* the instrument, could not be received to change its legal effect? This must be determined by what appears on the face of it; and I think it too clear for argument, that the check in question was, upon its face, the individual

*Farmers & Mechanics' Bank v. Troy City Bank.*

check of Patton, and that this legal presumption could not be rebutted by extrinsic proof, to show that it was the check of the bank.

But that case differs in many essential particulars from the one before us, as the check was signed generally by Patton, and, according to the view I take of it, contained on its face no evidence of its being the check of the bank.

Let me now test the bills declared upon in the present case by the rule I had occasion to lay down in a former part of this opinion. They are addressed to John A. Welles, cashier of the Farmers & Mechanics' Bank of Michigan, and accepted by him, with the addition of the word "cashier" underwritten. It is admitted that the true and best mode was not adopted, to show that the acceptance was intended to be that of the defendants below. This would have been most efficiently accomplished by signing the name of the bank to the acceptance, with the addition of the words, "by John A. Welles, cashier." But this was not done; and the question to be determined is, whether, from the nature of the contract, and the form of the instrument, it may not, without doing violence to any well established principle of law, be deemed, nevertheless, the acceptance of the bank, and not the individual acceptance of Welles. The contract is one known and recognized by the law merchant; it is the acceptance of a bill of exchange. But what is implied by such acceptance? Clearly a promise by the acceptor to pay the bill at maturity. The acceptor is primarily liable; he is the principal debtor; and his acceptance is an admission that he has funds in his hands to meet the bill. What, in the next place, is the form of the bill? It purports to have been drawn by Finch, cashier of the Bank of Homer, and is addressed to Welles, cashier of the Farmers & Mechanics' Bank, by whom it was accepted in the manner already stated. Can it then be fairly inferred that the

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*Farmers & Mechanics' Bank v. Troy City Bank*

acceptance thus made was intended to be the acceptance of the bank? We think it can, and that while this construction, which we deem the most just and natural one, does not conflict with any of the English cases that have been cited, it is clearly sustained by the weight of American authority. We feel confident that this construction carries into effect the intention of the original parties to the bill, and that that intention is sufficiently expressed on the face of the instrument, to be clearly apparent to any person to whom it might be negotiated.

No evidence appears to have been adduced on the trial, showing the custom of banks, as to the mode of making themselves parties to negotiable instruments; and it is not, perhaps competent for us, without such proof, to take notice of such custom, or to give it any consideration and effect in construing the bills in this case. But, knowing, as we do, that it is the uniform and universal usage of banks in this country, to draw, accept, and indorse bills through their cashiers, and that this is done by the signature of the cashier, with the mere addition to his name of the word "cashier," we should have come to a different conclusion, if compelled to do so, with great reluctance; and are glad to find ourselves able, after an examination of the authorities, to give a construction to the bills in this case, consistent with that which instruments so executed universally receive in the commercial world.

It will follow, then, that there was no error by the court, in charging the jury, "that the defendants, by their agent, John A. Welles, accepted the bills in question."

6. I now proceed to the consideration of the sixth error assigned. The court below were asked to instruct the jury, that, "if they believed that the drafts were drawn by the Farmers' Bank of Homer for their own accommodation, that Welles accepted them as cashier for the accommodation of the drawers, that the plaintiffs had

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Farmers & Mechanics' Bank v. Troy City Bank

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notice of these facts, and that the directors of the Farmers & Mechanics' Bank never approved, recognized or adopted as their own, the acceptances of Welles, then their verdict must be for the defendants." The court refused so to charge the jury, but charged that, "if the jury believed that Welles had not the *general* power to accept the drafts, and that the directors of the bank never adopted, approved, or recognized as their own, the acceptances of Welles, then their verdict must be for the defendants." I think the instruction asked for was pertinent, and justified by the facts elicited on the trial. That instruction was not answered by the very general charge given by the court. No instruction was asked respecting the *general* power of a cashier to accept bills of exchange; but the instruction requested was specific, respecting the power of the cashier to accept the *particular* bills, which constituted the subject matter of the suit. In any event, the charge was erroneous, as it submitted questions of law for the decision of the jury. Whether the cashier of the Farmers & Mechanics' Bank possessed the general power to accept bills, was a question of law, and not of fact.

But it was contended by the counsel for the defendants in error, that, admitting the charge to have been erroneous in this respect, yet, if it appear from the whole record in the case, that if the instruction as prayed for had been actually given, the verdict must have been for the plaintiffs below, this court will not reverse the judgment. It is well settled, that, if an instruction is asked for, which, though pertinent, is immaterial, and could in no respect influence the jury in the decision of the case, the refusal to give the instruction will constitute no ground of error. But, to sustain the views urged by counsel in argument, it must be assumed that the power of a cashier extends to the acceptance of mere accommodation bills. This

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Farmers & Mechanics' Bank v. Troy City Bank.

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assumption is too broad; it covers too much ground. I am not prepared to admit that the cashier of the Farmers & Mechanics' Bank possesses the power, in all cases, to draw or accept bills. That power is, and must be, limited to the drawing and accepting of bills in the usual and ordinary course of the business of the bank; in other words, in the legitimate exercise of the powers conferred upon the bank by its charter. It is very true that the cashier may abuse his trust, by accepting bills, and that the bank may be made liable by such acceptances; but the person who seeks to recover on such an acceptance, must be an innocent, *bona fide* holder, not affected by notice, actual or constructive, that in accepting the bill the cashier exceeded his powers. To establish a contrary doctrine would be destructive, as well of the rights of the bank as of the public, and cannot be justified upon principles of either policy or justice. The plaintiffs below are supposed to know the extent of the powers of a cashier. Those powers are defined and limited by law; and if, with a full knowledge on their part, of the entire want of authority in Welles to accept the bills in question, they advanced money upon them, I know of no principle of law, or ethics, that would authorize a recovery against the bank. But, in this case, there was something more than mere constructive notice. There was evidence tending to show that the plaintiffs below were informed that Welles accepted the bills for the accommodation of the drawer. If such was the fact, Welles had no authority to bind the bank. In this light the case should have been presented to the jury; and the failure so to present it, may have worked injustice to the defendants below. It may be that the verdict would have been for the defendants.

I have avoided the consideration of the question raised by the counsel respecting the effect of a recognition by the directors of the acts of Welles in accepting the bills

Farmers & Mechanics' Bank v. Troy City Bank.

in question, or whether a recognition by the directors would bind the bank, because it is not necessary to the decision of the cause that the judgment of this court should be passed upon that question. It is sufficient to authorize the reversal of the judgment below, that the court failed in doing its whole duty, by not presenting the case to the jury in the manner insisted upon by the counsel for the plaintiffs in error. We think the court should have decided upon the power of the cashier to accept the bills in question, upon the supposition that they were mere accommodation acceptances, and not referred that question to the jury, in connection with the question of fact; for, admitting the authority of the directors to ratify the act of Welles, whether there was a ratification or not, is a question of fact to be referred to the jury, guided by proper instructions as to what acts, on the part of the directors, would amount to a ratification.

The judgment of the court below must, therefore, be reversed, and the cause remanded, etc.

*Judgment reversed.*

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Kirby v. Ingersoll.

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**Zebulon Kirby, appellee, v. Justus Ingersoll and Nehemiah Ingersoll, appellants.**

The implied authority arising from the ordinary contract of copartnership does not authorize one of the partners, without the assent of his copartners, to make a general assignment of the partnership effects, to a trustee, for the benefit of creditors, giving preferences to some creditors over others. *Held*, therefore, that such an assignment made by one of two copartners, without the knowledge or assent of the other, who was present, attending to the business of the firm, and might have been consulted, was void:

It seems, however, that the power in one partner, to make such an assignment, may sometimes be implied from circumstances, showing that it was intended to be conferred.

Where one of two partners, without the knowledge or assent of the other, who was on the spot, and might have been consulted, assigned all the partnership effects to a trustee, for the benefit of the creditors, preferring some of them over others, and it appeared from the circumstances, that the assignment was made without any pressing necessity, and with a view to dissolve the copartnership, and to deprive the other partner of all power in the management and disposition of the partnership property; *Held*, that it was a *fraud* upon the rights of the partner who did not join therein, and was, therefore, void.

*Held*, further, that the fraud tainted the whole transaction; and that the assignment gave to the trustee no lien or security upon the partnership effects, for the payment of a debt due to him, which was preferred, by the assignment, over the claims of the other creditors.

It is no objection to the appointment of a receiver to take charge of partnership effects, that one of the partners has assigned his interest therein to a third person.

Appeal from the Court of Chancery. (*Vide S. C., Harr. Ch.*, 172-193.) The bill was filed September 5, 1839, and states that Kirby, the complainant, and the defendant, Justus Ingersoll, on the 9th of November, 1833, entered into copartnership in the business of tanners, curriers and dealers in leather; that no written articles of copartnership were executed, but, by the terms of the verbal agreement between them, the business was to be

*Kirby v. Ingersoll.*

carried on at Detroit, under the name of Ingersoll & Kirby; but they were to be equally interested in it, and to devote their time and skill to its management; and the profits were to be divided equally between them; that the partnership was to continue during the pleasure of the parties.

That immediately afterwards they purchased stock in trade to a large amount, including the stock and business of a firm then trading in Detroit, under the name of Justus Ingersoll & Co., and undertook to pay the liabilities of said firm, one of which was a debt due to the complainant of about \$900, which thus became so much capital paid in by the complainant. That, when the copartnership was formed, said Justus resided at Medina, New York, and he continued afterwards to reside there, and to devote his time exclusively to his own private business, for his own exclusive benefit, until September, 1838, when he removed to Detroit. That the complainant, during the existence of the copartnership, devoted his whole time to the business of the firm. That the business was prosperous and lucrative, and continued to be carried on without any material disagreement, until about the month of November, 1838, when some difference of opinion as to the mode of conducting it arose between the partners, and said Justus expressed a desire that it should be closed. That complainant interposed no objection, but expressed his willingness to dissolve the copartnership as soon as the business of the firm could be placed in a situation to secure to the creditors the speedy payment of their debts. That, immediately thereafter, complainant directed his whole attention to the collection of the outstanding debts due to the firm, and to the payment of its liabilities, which were reduced, within ten months previous to the filing of the bill, nearly \$11,000.

That, since the said month of November, 1838, com-

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*Kirby v. Ingersoll.*

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plainant and said Justus had, from time to time, with a view to close the copartnership business as fast as the same could be done without hazarding the interests of the creditors, or of the firm, made amicable divisions of property of the firm, each taking portions of the same to hold in severalty. That, among the property so divided were 540 hides, of the value of about \$2,000, set apart to said Justus, which he shipped to Medina, New York, and 728 sides of upper leather, of about the same value, set apart to complainant, which were packed away, apart from the partnership property, but in the same building where the business was carried on, and a building contiguous thereto; that the partners were not charged in the books of the firm, with the property so set apart to each by such division.

The bill further states that, while the business was thus in a train of final settlement, to wit, on the 27th day of August, 1839, said Justus, without any previous consultation with complainant, and without his knowledge or consent, made an assignment to the defendant, Nehemiah Ingersoll, wherein, after reciting that the said firm was justly indebted to James Abbott for rent accruing on a certain indenture of lease which the said Nehemiah had become liable to pay, by reason of a certain bond signed by him for said firm; that he was also liable to the amount of about \$10,000, on a bond executed by him to the Farmers & Mechanics' Bank to secure advances made to said firm; that he was also liable as indorser for said firm, of their note for \$2,000; that said firm was willing to secure and indemnify said Nehemiah, and also to pay him the sum of \$2,000, due him for advances to said firm; and also to secure the payment of all the other just debts, out of the property of said firm—that said Justus, using the name of the said firm of Ingersoll & Kirby, assigned to said Nehemiah the stock in trade, or the

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Kirby & Ingersoll.

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greater proportion of it, amounting to about \$9,000, and notes and accounts belonging to said firm to the amount of about \$6,000, and gave said Nehemiah full authority to sell and dispose of all the said property, and to collect all the said debts, and apply the proceeds: *First.* To the payment of himself the sum of \$2,000; *Second.* To pay off and satisfy any debts due from said firm, which he was in any manner bound to pay; *Third.* To pay off any other debt or debts justly due or owing by said firm; to retain out of the moneys collected a reasonable sum for his services; and to pay over any balance to said Justus and complainant, their heirs and assigns.

The bill further states that said Nehemiah is a brother of said Justus, and charges that, instead of being a creditor, he was in fact a debtor to said firm; that said Justus was largely indebted, individually, to said Nehemiah, for money borrowed of him; and that the assignment was made by said Justus, not for the purpose of securing any debt due from said firm to said Nehemiah, or of indemnifying him for any liability for said firm; that said Nehemiah had been the indorser for said firm during its whole existence, but that, at the time of making the assignment, there was no liability for the firm outstanding against him, except as collateral to the debts of the firm; that the indebtedness to the Farmers & Mechanics' Bank did not exceed \$6,700, no part of which was then due; and that the firm was in good credit and able to pay all its debts, and had been so ever since it commenced business.

The complainant further alleges in the bill, that, since the assignment, he has been prevented from attending to the business of the firm; that when he applied to examine the partnership books, he was abruptly refused, and was told by said Justus that the papers, books, notes and accounts were left in his, said Justus's, charge and care, by said Nehemiah, and that the complainant could not have

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Kirby v. Ingersoll.

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access to them ; and that, immediately after the assignment, said Justus caused a notice of the dissolution of said copartnership to be published.

The bill further states that there is a large amount of property, consisting of leather, hides, etc., and other stock belonging to said firm, and not mentioned in the assignment, now in the possession of the defendants; and also of notes and accounts due the firm, and not mentioned in the assignment, on which payment has been demanded by said Nehemiah ; that some of the stock of the firm consists of hides in the process of tanning, which require the constant attention of a large number of hands to fit them for market, and that there was danger that they would be lost unless some person duly authorized should take possession of the same ; that the assignment rendered it impossible for the complainant to continue in the partnership business ; that it placed the available assets of the firm beyond his power ; that he had offered to join in an assignment of said assets, for the purpose of paying the just debts of the firm, to any person who would accept such trust, and was capable of performing the duties required ; but had refused to ratify the assignment to said Nehemiah ; that no time was limited for the closing of the trust created by said assignment, and no security taken for the faithfulness of said Nehemiah ; that he was irresponsible ; that he was disposing of the property assigned ; that he had collected and received moneys belonging to the firm, and had sold some of the assets on credit ; and that there was danger that the property of said firm would be squandered and the creditors defrauded, etc.

The bill prays that the partnership may be dissolved, and a receiver appointed to take charge of the effects ; and that the defendants account, etc.

The answer of the defendants admits the partnership ; the purchase of stock, etc., of the firm of J. Ingersoll &

*Kirby v. Ingersoll.*

Co., to the amount of \$15,000; the indebtedness of that firm to complainant in about the sum of \$900; that this sum was credited to complainant as so much capital paid in, at the time of entering into copartnership; that complainant resided at Detroit, and conducted the business of the firm, as stated in the bill; and that said Justus resided at Medina, New York, and was engaged in attending to his own business up to September, 1838, when he removed to Detroit; but states that, by the partnership agreement, said Justus was relieved from devoting any part of his time to the business of the firm; states that the firm was indebted to him, for the tanning of hides at his tannery in Medina, and for leather, etc., furnished; that the business of the firm was extensive, but that said Kirby kept the books in a negligent and careless manner; that he neglected to keep any cash book, and refused to settle up the partnership affairs on any reasonable terms; that said Justus had often solicited a dissolution of the firm, but that said Kirby, whenever it was proposed, manifested a petulant and resentful spirit; that being satisfied that said Kirby was committing fraudulent acts in the management of the business and property of the firm, in the last part of August, 1839, he told the complainant that he should make an assignment of the partnership property, to pay the debts of the firm, and dissolve the partnership, to which he made no objection; that, on the 27th day of August, 1839, he made the assignment set forth in the bill; that said Kirby had often before expressed his willingness that said Justus should sell and transfer his interest in the partnership to said Nehemiah; and that he, said Kirby, should be fully satisfied with any arrangement which said Nehemiah should recommend for the final settlement and adjustment of all the affairs of said firm.

The answer further alleges, that said Nehemiah Ingersoll, from time to time advanced money to said Justus

*Kirby v. Ingersoll.*

for the use, and on the credit of said firm, for which there was due him from the firm at least \$1,600; and that said Nehemiah was not the debtor, but was the creditor of said firm, at the time of the assignment, to the amount of the last mentioned sum; that he was liable for said firm to the Farmers & Mechanics' Bank in the sum of \$6,700, on his bond to the bank, and was also liable for rent to James Abbott.

The defendants allege further, that the assignment was made for the purposes expressed therein, and no other; that it was made after the complainant had notice of the intention of Justus Ingersoll to make an assignment of the partnership property, and in pursuance of the lawful authority of a partner over the effects of the firm; and they deny that the firm was in good credit when it was made. The answer denies that the complainant ever offered to join in an assignment, and declared that soon after the assignment was made, Kirby called at the store, and was informed of the assignment, and the substance thereof, and that he replied that he presumed it was all right, but wished to take the advice of his counsel upon it, and would probably agree to it all. The defendants further say, that they know of no partnership property or demands belonging to said firm, not embraced in the assignment, unless it be real estate, or a few judgments rendered before justices of the peace, of trifling amounts; and charge that the complainant had in his possession money or effects belonging to the firm for which he has never accounted. They allege that said Nehemiah Ingersoll is fully responsible as to the property, and able and willing to execute the said trust; and deny all fraud, and all effort at secrecy, in making the assignment.

On the hearing, upon the bill and answer, of a motion made in the court below, by complainant, for the appointment of a receiver, the chancellor decreed that the assign-

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*Kirby v. Ingersoll.*

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ment be declared void, and that it be referred to a master to appoint a receiver; and that said Nehemiah Ingersoll deliver over to, and account with said receiver, for whatever had come to his hands by virtue of the assignment.

From this decree the defendants appealed to this court.

*H. N. Walker and D. Goodwin*, for complainant.

*A. D. Fraser, J. M. Howard and Witherell & Buel*, for defendants.

FELCH, J., delivered the opinion of the court.

The partnership between Justus Ingersoll and Zebulon Kirby was a limited one, being confined to the trade and business of tanners, curriers and dealers in leather, in the city of Detroit. The power of a partner in such firms, over the partnership property, is stated in general terms, in all the books, and would seem to be well settled. Within the scope of the partnership business, and for the purpose of carrying on that business, with a view to the making of profit for the benefit of the firm, the power of disposing of the property or effects is undoubted. So, also, within the same legitimate scope of such power, is the contracting of debts in the regular course of business of the firm, and the payment of debts, either by the use of the money or the property of the firm. The disposition of property in such case and for such object, is in accordance with the interest of the firm, is within the acknowledged power of a partner over it, and must be presumed to be done to advance the interests, and to continue the business of the firm. But when a conveyance is made by one partner, of all the partnership effects, to a third person, in trust, without the knowledge or consent of his partner, the effect of which must almost necessarily be to

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Kirby v. Ingersoll.

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close the copartnership business, another and more difficult question is presented.

In looking at the decisions of courts on this question, I shall inquire :

1. Whether one partner has the power thus to dispose of the partnership effects; and,
2. If so, is the case presented one in which there has been a proper *bona fide* exercise of that power?

1. In *Story on Partn.*, § 101, it is said that it may well admit of some doubt, whether the power of a partner extends to a general assignment of all the funds and effects of the partnership, for the benefit of creditors. In *Pierpont v. Graham*, 4 Wash., 232, the same doubt is expressed, and the point left undecided. In *Anderson v. Tompkins*, 1 Brock., 456, Chief Justice Marshall held that such an assignment was good, if the transaction was free from fraud. The general doctrine that such power was an incident to the partnership relation, is asserted by the court; but the point decided was, that, under the circumstances of that case, the power, by assent of the other partner, must be presumed. Murray, the partner who did not join in making the assignment, was beyond seas when it was executed; and it is stated by the court that he "had a right to be consulted. Had he been present he ought to have been consulted. The act ought to have been, and probably would have been, a joint act. He had, by leaving the country, confided every thing respecting their joint business to Tompkins, who was under the necessity of acting alone." And again—it is said that, "should goods be delivered to trustees for sale, without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But, if the necessity be apparent, if the act is justified by its motives, if the mode of sale be such as the circumstances require, I cannot say that the part-

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*Kirby v. Ingersoll.*

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ner has exceeded his power." And, in another part of the opinion, it is asserted of the absent partner that, "in leaving the country, he must have intended to confide all his business to the partner who remained for the purpose of transacting it."

In *Dickinson v. Legare*, 1 *Dessaus.*, 537, the Court of Chancery of South Carolina decided against the validity of such an assignment. That assignment, however, was made by one of the partners, then in England, a prisoner of war, while the other partners and the property assigned were in this country, to secure the payment of a particular debt. This decision is said to be overruled in *Robinson v. Crowder*, 4 *McCord's L. R.*, 519. I have been unable to obtain the report of the last case, or to ascertain the precise point which was decided by the court.

*Mills v. Barber*, 4 *Day*, 428, decides simply that one partner has power to transfer a chose in action to a creditor of the firm, with authority to collect and apply the proceeds to his own use.

In *Harrison v. Sterry*, 5 *Cranch*, 289, an assignment of certain partnership property and choses in action, to a trustee, was made by one partner in New York, the others being and residing in London. The object of the assignment was to sustain the firm in the embarrassments into which they had fallen, and to enable them to continue their partnership business. The objection that the partner had no power to make the assignment was overruled by the court. They put their decision on the ground that the whole commercial business of the company in the United States was necessarily committed to Robert Bird, the only partner residing in this country, and he had the power to collect or transfer the debts due to them. They declare the assignment to be an act of this character, and within his power as managing partner.

In *Egberts v. Wood*, 3 *Paige*, 517, the Chancellor of

*Kirby v. Ingersoll.*

New York held, that it was the better opinion that one partner might assign the partnership effects, in the name of the firm, for the payment of the debts of the company, although by it, a preference was given to one set of creditors over another; but he declined deciding the question as to the validity of an assignment made to a trustee by one partner against the wishes and without the consent of his copartner.

In *Havens v. Hussey*, in the same court, 5 *Paige*, 30, the question received a direct adjudication. An assignment was made of all the partnership effects to a trustee, in trust, to pay certain preferred creditors of the firm. It was made in the name of the firm, by one of the partners, without the consent of the other, and against the known wishes of her son, who was present, and attended to her interests. The chancellor held that the implied authority arising from the ordinary contract of partnership, did not authorize such an assignment. The assignment was declared void, and a receiver appointed.

In *Hitchcock v. St. John*, 1 *Hoffm.*, 511, Mr. Vice Chancellor Hoffman examined the same question very fully, and decided that there was no power in one partner to make an assignment of the character above indicated.

In the argument of this cause it was strongly urged in support of the power of one partner, to make the assignment in question, that the authority of each partner extended to the full right of disposition of all the partnership property; that he might sell the whole, even though it should render a dissolution necessary; and that, in fact, a sale of the whole property would not be, or necessarily cause a dissolution of the partnership. This general power is not denied, but it must be confined to the legitimate scope of the partnership business. Within the limits of the regular business of the firm the power is undoubted.

*Kirby v. Ingersoll.*

One partner in a store may sell to purchasers every article of the stock in trade, either for cash or in payment of a creditor or creditors. He may do this although it should be out of the power of the firm to replenish the stock, and a dissolution would be the consequence. The inquiry is not what is the consequence of the act—for each has trusted the other to exercise his own judgment—but is the act itself within the limit of his power? Is it within the scope of that agency, which each partner bestows upon his fellow, with a view to carry on the business of the firm, for the mutual benefit of all? The power in all of these acts of one for all, has its origin in the consent, or presumed consent, of the other partners. But what consent is presumed to be given to one partner to make an assignment of all the property and effects of the firm, which withdraws the property from the control of his copartner, and places it in the hands of a trustee of his own choice, with a view to a distribution of the proceeds among creditors preferred by him? Can it be said that, in an ordinary partnership, without special stipulations, and without a showing of acts of the parties, or of special circumstances, to warrant the presumption of the assent of the other partners, each is invested with full power to bind the others, by such a transaction? While both partners are present, and attending to the ordinary business of the firm, will it be said that each is intrusted by the other with this extraordinary power of closing, at the same time, the business of the firm, and depriving his copartner of all participation in the sale of the property? I can scarcely think that such power is ever intended, or understood to be given, by one partner to another. The law has fixed the rights and powers of partners on the dissolution of a firm, with as much precision, as in carrying on the business of the firm. Under the partnership existing between Inger-

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*Kirby v. Ingersoll.*

soll and Kirby, either had the power at will to dissolve the connection. In that event, the law fixed the rights of the individual partners to the property ; it contemplates its application to the payment of the debts of the firm. It presupposes the individual exertions, and the exercise of the judgment of the former partners, in the sale and application of it ; and it affords to each a full remedy for any misconduct, or fraudulent act of the others in reference to it, by enabling him to procure the appointment of a receiver, and through him a proper application of the assets.

The partnership relation implies, then, the full right in each partner of disposing of the entire property of the firm, in all the ordinary methods pertaining to the business, for ready pay, on credit, or in payment of the debts of the firm. It implies, also, the power, in the manner recognized by law, to dissolve the firm ; and the right to have the assets duly applied, either by the mutual acts of the parties, or by the interference of a Court of Chancery. But the power of dissolving the firm, and at the same time excluding the other partners from all participation in the administering of the property, by the appointment of a trustee for preferred creditors, it seems to me can hardly be presumed among the powers granted by the partners to each other. It would rather seem that the contract was made in reference to the rights of parties as secured by law on a dissolution, than that a power was given so totally at variance both with the law and the rights of parties.

I speak here of the power of one partner, implied by law from the mere partnership relation. Power beyond this may be given, in a particular instance, or may be inferred from the conduct and course of business of the partners. The circumstances in which one partner is placed, may sometimes give him powers to do what otherwise the law would not imply. The circumstances must,

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*Kirby v. Ingersoll.*

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in such case, be such as to authorize the presumption that such power was conferred by the other partners. Of this class appears to have been the case of *Anderson v. Tompkins*, above cited, where the partner who did not join in the conveyance, was abroad. It is expressly declared that, if he had been present, he should have been consulted; and, by leaving the country, he had confided full powers in the acting partner, to manage the joint business. The case of *Harrison v. Sterry*, cited above, was also of the same class; and the power was sustained with similar remarks from the court. This case, however, was not an assignment of *all* of the partnership property, nor was the assignment made with a view to dissolve the firm.

In case of the absence of one partner out of the country, confiding the whole management of the business of the firm to another, who remains in full charge, it does not seem to me to violate any rule, to presume that the former has given to the latter more ample power than he would possess if both were present, personally overseeing the business. The absent partner, having withdrawn both his personal services and advice, may well be supposed to have invested the other, not only with the ordinary power of managing the affairs, but also with all powers necessary to be exercised in the case of any extraordinary emergency. When embarrassments had fallen upon a house thus situated, and an assignment had been made by the acting partner, which was dictated by prudence, justified by its motives, and unexceptionable in its mode, I see no reason to quarrel with the inference, that such power was conferred by the absent, upon the acting partner. It would be, however, not upon the principle that such power was necessarily conferred or implied, in the very relation of partners, but that the extraordinary circumstances of the case showed a power to manage the

*Kirby v. Ingersoll.*

partnership concerns, conferred by the absent partner, which would extend to the act in question. And it is not a little remarkable, in the extensive investigation which this cause has received, that no case is cited in which an assignment has been sustained, which was made by one partner while both partners were present, attending to the business of the firm ; while the adjudications cited from 5 *Paige*, and 1 *Hoffm.*, directly decide the question, and deny the validity of such an assignment.

It seems to me to follow from this view of the law of the case, that it is not within the ordinary powers arising from the partnership relation, while the business of the firm is proceeding in the usual manner, and both partners are present and attending to the affairs of the firm in the ordinary manner contemplated by their partnership agreement, for one partner to make an assignment to a trustee for the benefit of preferred creditors, with the design of putting an end to the partnership, and closing up its concerns. But the power to make such assignment may be conferred by one partner on another, or may, like any other power, be inferred from the conduct of the partners, their manner of doing business, and the circumstances in which they place themselves in reference to the business of the firm.

2. If it be admitted, however, that the power of one partner is perfect to convey the whole partnership effects, to a trustee, to pay preferred creditors, that power could only be exercised in a case free from all fraud. In the exercise of all the powers conferred by one partner on another, to bind the firm by his acts, perfect good faith in regard to each is required ; and if a third person knowingly participates in a transaction with one partner not in good faith to another, the transaction cannot be sustained. Thus, the power to buy goods to an unlimited amount, in the name and on the credit of his firm, exists

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*Kirby v. Ingersoll.*

in each partner of a mercantile house ; yet, if such goods were bought by one partner to apply to his private purposes in fraud of the firm, and the vendor knew it, he could not recover the amount of partners. So, the power to give the notes or bills of exchange of a firm, is within the authority of each partner ; still, if he fraudulently gives them for his own private purposes, and the payee knows of the fraud on the firm, the latter will not be bound. These are familiar instances of the principles applicable in such cases.

In the case before us, it is evident from the pleadings, that the assignment was made by the partner who had not usually been the acting partner ; that it was of all, or nearly all, the effects of the firm, with the lease of their place of business ; that it was made to the brother of the assigning partner, who resided in the same place ; that it was made with a view to dissolve the partnership, and had the effect to prevent their proceeding with business ; that the complainant was excluded from examining the books of the firm or controlling the property ; that the assigning partner had control as the agent of the assignee ; that the complainant was present and attending to the business of the firm, but was not consulted nor did he consent to this assignment, although some general conversation about an assignment is stated to have been had with him at previous times.

Two things, it is said in *Pothier*, must concur to enable a partner to dissolve a partnership : 1. The renunciation must be made in good faith ; and, 2. It must not be made at an unreasonable time : *Story on Partn.*, 271. A transaction dissolving a partnership in so extraordinary a manner, and excluding the other partner from all enjoyment of the right to participate in the distribution of the effects, and giving to the brother control of all the property for the benefit of preferred creditors, appears to me

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Kirby v. Ingerson.

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to be clearly a fraud on the rights of the complainant. No necessity justified it, and no authority was given by the complainant, and no act appears to have been done from which such authority can be inferred. The complainant was present, and might have been consulted. The very object was evidently to shut out the complainant from the power over the partnership property and concerns, with which the law has invested each partner on such dissolution. If sustained, the effect is not only to exclude the complainant from such control over the property, but also to deprive him of the usual right to have his interests protected, and the affairs of the firm settled, under the impartial administration of officers appointed for that purpose by a court of equity.

From the very nature of the transaction, the trustee cannot be deemed ignorant of the object or effect of the assignment. His aid in carrying out the design of the assigning partner was but to exclude the complainant from his legal rights, and must be deemed to be in fraud of those rights. I would not be understood as imputing to the highly respectable parties in this case, a premeditated or wicked intention to destroy or injure the interest of the complainant; both the assignor and the assignee might have supposed that the assignment was clearly within the powers conferred upon the former by the partnership relations; but we are here to settle a general principle respecting the legal rights of partners, which shall apply to all cases as well as to the present. And when we are satisfied upon the facts appearing in the case, that such an assignment made and accepted must operate as a fraud on the complainant's rights as a partner, it is our duty to declare such an assignment both unauthorized and void.

It is contended by the defendants that the assignment is at least good for the share of the party who executed it, in the property of the firm. But the property must

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Kirby v. Ingersoll.

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first be applied to pay the debts of the firm. It is a fund especially devoted to that purpose; and the separate interest of each partner is only such as remains after the partnership debts are discharged. For this purpose the complainant asks that it go into the hands of a receiver. There can be no claim to the individual share of the other partner which should prevent this application: *Story on Partn.*, 135; *Coll. on Partn.*, 77.

Again—it is urged that the assignee was a *bona fide* creditor of the firm, and that the assignment should be sustained so far, at least, as to give him security for the payment of his debt, out of the assets, in preference to other creditors. The assignment in trust is entire; and we have already seen that it must be regarded as fraudulent, in its effects upon the rights of the complainant. This has tainted the whole transaction, and rendered it ineffectual to sustain rights attempted to be secured by it, to the assignee. It is not the case of an instrument good in part and bad in part; the fraudulent design attaches itself to the entire transaction, and he who participates in it can take nothing under it. If the law was otherwise, the principle asserted, as to the right of one partner to make such a conveyance, would be ineffectual to secure the interests of the other partners. A creditor, or a pretended creditor, might always be chosen as the assignee, if that alone was sufficient to sustain the assignment, and if it was sustained for that purpose, and the trustee allowed, as is here claimed, to retain the property for the purpose of selling and applying the proceeds to the discharge of his claim, the whole evil of such a conveyance would be sanctioned.

The decree of the chancellor was, in the opinion of this court, correct, and it must be affirmed, setting aside the assignment and declaring it void, ordering a reference to a master to appoint a receiver, and that the trustee deliver

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*Kirby v. Ingersoll.*

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ever the property to the receiver, and account for whatever has come to his hands by virtue of said assignment. And for the purpose of carrying into effect this decree, the cause must be remanded to the Court of Chancery.

WHIPPLE, J., dissenting. The only question presented for the decision of this court is, whether the assignment executed by Justus Ingersoll, and set forth in the pleadings, can be sustained. I agree with the chancellor, that no question of greater practical importance has ever arisen since the organization of our state government; and I have, therefore, felt bound to examine it with great care and deliberation, as it is probable that its adjudication in the present cause, will be regarded hereafter as authoritative. In the case of *Brown v. Kellogg et al.*, the Supreme Court of the late territory decided the identical question upon which the judgment of this court is now to be pronounced, and that decision was acquiesced in, until the filing of the bill in the present case. We are not bound by that decision, although, *upon a doubtful question*, it should have its just weight, as it might affect rights acquired under the impression that a rule prescribed some years since, and acquiesced in, would not be disturbed.

I propose, very briefly, to test the validity of the assignment made by Justus Ingersoll, by those general principles which govern and control mercantile copartnerships, and by the authorities which were cited by counsel on both sides upon the argument.

No principle is better established than "that the transactions of partners, in which they all severally and respectively join, differ in nothing, in respect to legal consequences, from transactions in which they are concerned individually:" *Gow on Partn.*, 52; *Watson on Partn.*, 167. Let us now consider in what instances the act of one partner shall be construed to be the act of all. It

*Kirby v. Ingersoll.*

may be laid down, as the principle resulting from the contract of copartnership and the relation growing out of such a contract between the parties to it, "that partners are bound universally by what is done by each in the course of the partnership business." When acting within the rule thus prescribed, each partner is considered not merely as a principal, but as the general and authorized agent of the firm; so that, every act which the copartners might jointly do, may be lawfully done by each, in the name of the firm. The very existence of commerce may be said to depend upon the recognition of this principle; for, without it, mercantile copartnerships would, to a great extent, cease to exist. One partner may, in the name of the firm, draw, indorse and accept negotiable instruments; may induce a joint responsibility by any contract or agreement for the purchase or sale of goods; he may borrow money; he may pay the debts of the firm; and to this end has authority to sell any or all of the copartnership property; he may employ an agent or agents in managing the affairs of the firm; he may authorize such agent or agents to draw, indorse or accept bills in behalf of the firm; he may even bind the firm by an act not having relation to their joint business, provided it receive their assent express or implied; he may even bind the firm in many cases, upon an agreement made for his own special benefit. Over the whole copartnership property, one partner "may exercise the *jus disponendi*, and in the absence of fraud, the sale will be binding upon the firm:" *Gow on Partn.*, 68. "He may pledge the partnership effects, and the pledge will bind his copartners:" *Gow on Partn.*, 70. Such is an enumeration of some of the powers which each partner possesses. These powers result from the nature of the connection of partnership—a relation implying unlimited confidence—each declaring to the world his confidence in the integrity of the others, and undertaking

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Kirby v. Ingersoll.

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impliedly to become responsible for the act of each within the compass of the copartnership concerns. Did Justus Ingersoll, then, in executing the assignment in question, exceed the powers with which he was by law invested? If he did, the assignment must be declared void; as the exercise of an unwarrantable authority would be regarded as a *legal fraud* upon the rights of the complainant. This question has been discussed and decided in several of the state and federal courts; and applying to it the principles I have laid down, conflicting opinions have been expressed. In the case of *Dickinson v. Legare*, 1 *Desaus.*, 537, Chancellor Matthews decided that a general assignment of the whole copartnership effects by one of the partners when abroad, without the knowledge or consent of the partners at home, but for a partnership debt, was void. The correctness of this decision is questioned by Mr. Collyer, in his valuable treatise on partnership, and has since been overruled in the case of *Robinson v. Crowder*, 4 *McCord*, 519. In the case of *Havens v. Hussey*, 5 *Paige*, 30, the chancellor declared an assignment of all the partnership effects, executed by one of two copartners, without the consent of the other, and against the known wishes of her agent, void. In declaring his opinion, the chancellor remarked, that he had, in the case of *Egberts v. Wood*, 3 *Paige*, 517, arrived at the conclusion that, from the nature of the contract of copartnership, one of the partners, during the continuance of the copartnership, might make a valid assignment of the partnership effects, or of so much thereof as was necessary for that purpose, in the name of the firm, to one or more of the creditors, in payment of his or their debts; although the effect of such assignment was to give a preference to one set of creditors over another. But, as it was not necessary for the decision of that case, he did not express any opinion as to the validity of an assignment of the partnership effects

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*Kirby v. Ingersoll.*

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by one partner, against the *known wishes* of his copartner, to a *trustee*, for the benefit of the favorite creditors of the assignor, in fraud of the rights of his copartner to participate in the distribution of the partnership effects among the creditors, and in the decision of the question as to which of the creditors, if any, should have preference in payment out of the effects of an insolvent concern. He then declares the assignment to be illegal and inequitable; and this opinion is founded on the reason, that it is no part of the ordinary business of a copartnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in equal proportions; and that no such authority as that can be implied; but, on the contrary, such an exercise of power by one of a firm, without the consent of the other, is, in most cases, a virtual dissolution of the copartnership.

Such was the reasoning of Chancellor Farnsworth, in delivering his opinion in the present case.

In the case of *Egberts v. Wood*, Chancellor Walworth affirmed the doctrine that, from the nature of the contract of copartnership, one partner might make a valid assignment of the partnership effects, in the name of the firm, to one or more creditors, in payment of his or their debts, although the effect might be to give a preference to one set of creditors over another. In the case of *Havens v. Hussey*, the principle decided was, that such an assignment made by one partner to a *trustee*, against the known wishes of the other was void. The distinction, then, between the two cases, is simply this: that in the first case, the assignment is made directly to a creditor, and in the second, the assignment is to a *trustee*, for the *benefit* of a creditor or creditors. But does such a distinction in fact or in principle exist, as will authorize a court to declare the assignment made directly to a creditor legal, which, if made to a *trustee* for the *benefit* of the same

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Kirby v. Ingersoll.

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creditor, is fraudulent and void? I have been unable to draw a line of distinction between the two cases. No reason for such a distinction is given by Chancellor Wal-worth, except that it was no part of the ordinary business of a copartnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors, and that no such authority can be implied. The principle is incontestable, and is fully admitted, that the effects of a copartnership are pledged to the payment of the copartnership debts; that the members of a firm, or any one member, may sell or assign the whole of those effects to pay the debts owing by the firm, although the effect may be to give a preference to one set of creditors over another. If these principles be sound, it is difficult to conceive why the same object and purpose may not be accomplished through the agency of a third person or trustee. The property, it is true, is assigned to him; he may be the *legal* owner; but the creditors have the *beneficial* interest. Instead of assigning the effects directly to the *creditor*, the assignment is made to a *trustee* for the *benefit of the creditor*. In other words, the principal thing to be done is the fair and lawful one of paying the debts of the firm. The *mode* of doing the thing is the mere incident, and ought to be left to the discretion of the party executing the assignment, whose interest, as well as that of the firm, might be greatly promoted by the appointment of a trustee. In such a case, the trustee is a mere agent appointed to dispose of the effects; the creditors are the persons beneficially interested; the assignment inures to their benefit; so that, in point of fact, there is no real distinction between the two cases. This seems to me to be the plain common sense view of the question; and I confess myself unable to discover why an assignment should be stigmatized as fraudulent, when its object is meritorious, simply because in the mode or form of

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*Kirby v. Ingersoll.*

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accomplishing that object, it should be deemed expedient to appoint an agent or trustee. It is said that each partner has a *right* to be heard in the selection of a trustee, and of the creditors for whose benefit the trust is created. This right does exist; but it does not follow, that an assignment naming a trustee, and the creditors for whose benefit it may be executed, is void, because that right has not been respected. Each partner of a mercantile firm has a right to be consulted in respect to each and every transaction in relation to their joint business; but it does not follow that every transaction in which the right has not been exercised, is to be characterized as fraudulent. Each partner has a right to be consulted in respect to the amount of purchases the firm may make; but yet he will be holden to the full amount of such purchases, although he may have never been consulted, and although the purchases may have been made contrary to his express wish. One of several members of a firm may take from the drawer all the funds of the firm, and discharge a debt due a single creditor, without consulting the wishes of his copartners; yet, such a transaction would be sustained, although the effect might be to prefer one set of creditors to another. I might multiply, indefinitely, instances in which the right to be heard and consulted by the several members of a firm may exist, and yet the most momentous concerns of that firm may be managed and controlled by one of its members, without consultation or advice with the others. The only practical rule, I think, that can be laid down is, that, where the object to be attained, or the thing to be done, is unexceptionable and legal, each partner must exercise a sound discretion as to the mode in which that object is to be effected, or the thing is to be done. If this discretion has been exercised honestly and without *actual* fraud, I know of no reason why the transaction should be pronounced fraudulent.

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Kirby v. Ingersoll.

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But if, in the selection of the trustee or agent, or in giving a preference to one class of creditors over another, there are circumstances which induce the belief that *fraud in fact* was meditated, then a court of equity might be successfully appealed to for relief. But in the absence of fraud, either in respect to the object to be attained, or the means of attaining it, I know of no reason why assignments of this nature should be declared void.

The view I have taken of this case is strongly sustained by the following cases: *Anthony v. Butler*, 13 Pet., 433; *Harrison v. Sterry*, 5 Cranch, 289; *Mills v. Barber*, 4 Day, 425; *Lamb v. Durant*, 12 Mass., 57; *Anderson v. Tompkins*, 1 Brock., 456. This last case was decided by Chief Justice Marshall, and the whole of his reasoning was directed to the vindication of the power of one copartner to convey the partnership effects, to the creditors of the firm, in payment of their debts, either *directly*, or through the intervention of trustees; and he decides that, if the transaction be *bona fide*, the assignment will not be set aside, although the consent of the other partners was not obtained. "The mode of sale," says the chief justice, "must, I think, depend on circumstances. Should goods be delivered to trustees, for sale, without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But if the necessity be apparent, if the act is justified by its motives, if the mode of sale be such as the circumstances require, I cannot say that the partner has exceeded his power."

Upon a careful examination of the bill and answer in this case, I am not prepared to say that the mode of disposing of the effects was not justified by the circumstances of the parties; and if the answer be true, "the act was justified by its motives."

I have not the time, and if I had, I have no disposition

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Rood v. School District No. 7, of the Town of Bloomfield.

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to review the several cases cited by me and referred to by counsel, to sustain the view I have taken upon the question under consideration. They all differ in respect to the facts; but the reasoning of the judges who pronounced opinions goes to confirm the opinion I have formed, that the assignment executed by Justus Ingersoll to his brother, Nehemiah Ingersoll, must be sustained; and that, to impeach such an instrument, it must appear that the transaction was tainted with fraud.

GOODWIN, J., did not participate in the decision, having taken part in the argument as counsel, before he took his seat upon the bench.

*Decree affirmed.*

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Rood v. School District No. 7, of the Town of Bloomfield.

The docket entry of a justice's judgment must be as certain, in matters of substance, as the judgment of a court of record. (a)

Under the proper entitling of a cause with the names of the parties, a justice of the peace entered on his docket an award of judgment in the following form: "It is therefore considered, that the said P. do recover of the said D. the sum," etc. In debt on this judgment, it was held, that the docket entry did not show with sufficient certainty in whose favor, and against whom, the judgment was rendered, and that, therefore, a transcript thereof, offered in evidence, was inadmissible. (a)

Held, also, that parol evidence was inadmissible to prove that the letters "P." and "D." in the docket entry of the judgment, meant plaintiff and defendant. (b)

Case reserved from Oakland Circuit Court. Debt on a judgment rendered in favor of the plaintiff, against the defendant, before a justice of the peace. In the transcript offered in evidence by the plaintiff to prove the judgment,

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(a) Approved: Howard v. People, 3 Mich., 207, 209; distinguished: Overall v. Pero, 7 Mich., 315.

(b) See Allen v. Carpenter, 15 Mich., 32.

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Rood v. School District No. 7, of the Town of Bloomfield.

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the cause was properly entitled with the names of the parties, and the award of judgment was as follows: "It is therefore considered, that the said *P.* do recover of the said *D.* the sum of," etc. The defendant having objected to the reading of the transcript, on the ground that it did not sufficiently appear therefrom that a judgment was rendered in favor of the plaintiff against the defendant in this suit, the plaintiff offered as a witness Morgan L. Drake, who testified that he was present when the judgment was rendered by the justice, and called his attention to the informal manner in which it was entered, and that the justice remarked that it was his practice so to enter judgments rendered by him; that the letters *P.* and *D.* were, by the justice, intended for and meant *plaintiff* and *defendant*. This testimony was objected to by the defendant; but, by the consent of parties, it was received, and a verdict taken for the plaintiff, subject to the opinion of this court upon the following questions: 1. Whether sufficient appeared in the transcript to show that a judgment was rendered in favor of the plaintiff against the defendant in this suit. 2. Whether the parol evidence to explain the meaning of the words *P.* and *D.* in the transcript was admissible.

RANSOM, C. J., delivered the opinion of the court.

It was contended by the plaintiff that, inasmuch as the names of the parties were properly inserted by the justice in the entitling of the cause on his docket, the letters *P.* and *D.*, with the word "said" prefixed, manifestly referred to the parties plaintiff and defendant; and that it sufficiently appeared from the transcript itself, in favor of whom, and against whom, the judgment was rendered.

The docket entry of a justice's judgment, is not, technically, a record; but it has all the effect of a record, and should be made in language as explicit and certain, as to

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*Sears v. Schwarz.*

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matters of substance, as a judgment record of this court. There certainly should be no doubt or uncertainty as to the parties. Who they are, plaintiff and defendant, and in whose favor, and against whom, the judgment was rendered, should appear clearly and conclusively from the docket itself. This did not sufficiently appear in the transcript offered in evidence in this case.

It requires no argument or authority to show that an ambiguity, apparent on the face of a transcript of judgment, cannot be explained by parol evidence. The evidence received for the purpose of explaining the meaning of the letters *P.* and *D.*, was clearly inadmissible.

*Certified accordingly.*

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**Sears and others, appellants, v. Schwarz and others,  
appellees.**

This court has no power, in a case brought here by appeal from the Court of Chancery, to grant a motion made by the appellant, for leave to supply, by a sworn copy, a master's report in the cause, discovered, after the taking the appeal, to have been lost from the files of the court below.

It seems that the Court of Chancery would have power to grant such a motion, even after the appeal, for the purpose of giving effect to it.

This cause came into this court on appeal from the Court of Chancery. The bill was filed to foreclose a mortgage. On affidavits showing that, prior to the passing of the final decree in the court below, certain master's reports of the amount due on the mortgage were made in the cause, which it had been discovered, since the appeal was taken, had been lost from the files of that court, and that the master who made the reports had correct drafts

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Sears v. Schwarz.

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of them, the appellees now moved for leave to file in this court, as a part of this case, sworn copies of the reports so lost.

*A. D. Fraser and A. Davidson, in support of the motion.*

*A. W. Buel, contra.*

GOODWIN, J., delivered the opinion of the court.

In order to determine whether this motion ought to be granted, it is necessary to consider the effect of the statute providing for appeals from the Court of Chancery to this court.

The Revised Statutes (*p. 379, § 124*) provide, that when an "appeal shall be perfected, the proper register of the Court of Chancery shall make out and transmit to the proper clerk of the Supreme Court, a certified copy of the bill, answers, pleadings, depositions, and all other papers belonging to the cause."

It will be perceived by this section, that this court is to hear the cause upon the pleadings and proofs certified by the register to this court.

The next section provides that, "upon any decree of the Court of Chancery being brought by appeal to the Supreme Court that court shall examine all errors that shall be assigned, or found in such order or decree, and shall hear and determine such appeal, and all matters concerning the same, and shall have power to reverse, affirm, or alter such decree, and to make such other order or decree therein, as justice or equity shall require."

It is upon the appeal being brought into this court in the manner provided by the statute (the 124th section directing how the proceedings shall be brought here), that this court is to proceed and examine the errors assigned in the decree, and hear and determine the appeal.

It is contended that, by the latter part of the 125th section,

Sears v. Schwarz.

the cause stands in this court as in the Court of Chancery, and that we have the same power as the Court of Chancery would have, to make this order. The words of the clause referred to, that this court "shall have power to reverse, affirm, or alter such order or decree, and to make such other order or decree therein as justice or equity shall require," only give this court this authority in examining the appeal and matters concerning it, upon the proceedings, pleadings, and proofs returned, in pursuance of the statute, from the court below to this court. We are, therefore, of opinion, that the application of the appellees is not made to the proper tribunal. It should be made to the Court of Chancery, and not to this court. That court can give the relief sought; and, when the defect is supplied, the proceedings which are wanting may be brought into this court in the appropriate manner. The provision of the statute (*R. S.*, 379, § 122), for staying proceedings, applies to proceedings on the order or decree appealed from, and would not, in our judgment, prohibit the chancellor from granting an order to supply lost papers, which belong to the cause, for the purpose of giving effect to the appeal, as provided for by the statute.

*Motion denied.*

506

END OF JANUARY TERM.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
STATE OF MICHIGAN,

IN JULY TERM, 1844.

P R E S E N T:

HON. EPAPHRODITUS RANSOM, - - - - CHIEF JUSTICE.  
HON. CHARLES W. WHIPPLE,  
HON. ALPHIEUS FELCH,  
HON. DANIEL GOODWIN, } JUSTICES.

Gardner v. Gorham and another.

The giving a promissory note or other security for goods sold, is no payment, unless it is specially agreed to be so taken. (a)

*Assumpsit* for goods sold. Plea, general issue. On the trial, the plaintiff offered evidence showing that he sold goods to the defendants for a stipulated price, and received therefor certain securities, executed by third persons; that he collected one of the securities, but that the other was worthless, and he afterwards offered to return it to the defendants. In connection with this, he also offered other evidence, from which it was doubtful whether it was agreed between the parties that the securities should be received in payment, or not. The court having rejected the evidence, it was held, on error, that, if there was no agreement between the parties that the securities should be received in payment, the evidence offered would have entitled the plaintiff to a verdict; that whether there was such an agreement or not, was a question for the jury; and, as it might have been inferred from the evidence offered that there was none, its rejection was erroneous.

Held, further, that it was not necessary for the plaintiff to declare specially in such a case.

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(a) To the same effect: Dudgeon v. Haggart, 17 Mich., 273; and see Jennison v. Parker, 7 Mich., 355, 365.

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*Gardner v. Gorham.*

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Error to Calhoun Circuit Court. Gardner sued Gorham and another in *assumpsit*. The declaration contained a count for goods sold and delivered, and also the common money counts. The plea was the general issue.

The bill of exceptions states that on the trial of the cause, the plaintiff offered to prove "that, some time in the fall of 1838, he sold the defendants a quantity of cloths and flannels, amounting to \$700 and upwards, and received *in payment therefor* a bond and mortgage executed by one Prindle, for about \$300 and interest; and a note and mortgage for about \$400, executed by one Platt, to one Gale, and assigned to the defendants; that, at the time of the *sale* and delivery of the said *notes* (?) and mortgages, *by the plaintiff to the defendants*, (?) the plaintiff told the defendants that, if he took them in payment, it would be upon their representations, which were that the securities were good, and well secured on good property; to which the defendants replied, that it was all right, and if it was not, they should feel bound to make it so; that they refused to guaranty the payment of the securities; that, in fact, the note and mortgage executed by Platt, were worthless, and of no value, which was known to the defendants. The plaintiff further offered to prove that he kept the bond and mortgage executed by Prindle, which was good, and had in part collected the amount due thereon; and that he offered to return to the defendants the note and mortgage executed by Platt." The counsel for the defendants objected to the introduction of this testimony. The court sustained the objection and rejected the evidence. To which decision the plaintiff's counsel excepted; and, having been compelled to submit to a nonsuit, removed the cause into this court by writ of error.

*Woodruff*, for the plaintiff.

*Pratt & Crary*, for the defendants.

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Gardner v. Gorham.

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WHIPPLE, J., delivered the opinion of the court.

[After some remarks upon the loose and inartificial manner in which the bill of exceptions states what facts the plaintiff offered to prove, and the consequent difficulty in ascertaining therefrom, with certainty, what these facts were, the opinion proceeds:]

The facts offered to be proved by the plaintiff on the trial below were probably as follows: That, some time in the fall of the year 1838 the plaintiff sold to the defendants domestic cloths and flannels, at a stipulated price, and agreed to receive in payment the securities above mentioned, with the understanding that certain representations made by the defendants, that the securities were good, and well secured on good property, should prove correct.

Upon the argument of the cause it was urged that the testimony was inadmissible, on the ground that, if the representations respecting the character of the securities were false, it was the duty of the plaintiff to rescind the contract, which was entire, by returning to the defendants *all* the securities received, and then resort to his appropriate remedy to recover the goods in specie, or their value; but that the plaintiff having retained the bond and mortgage of Prindle, upon which a partial payment had been made, and which was esteemed good and available, he could not, by an offer to return the note and mortgage executed by Platt, recover the difference between the price agreed to be paid for the goods, and the amount specified in the bond. No rule is better established than that a party upon whom a fraud has been practiced in making an agreement, has the right to rescind that agreement upon discovering the fraud; but, to render such an act effectual, he must avail himself of the earliest opportunity after the fraud is discovered, to put the opposite party in the same position he occupied when the fraudu-

Gardner v. Gorham.

lent agreement was entered into. Thus, if property has been received, it would be his duty to return it, with notice of his intention to rescind the contract; for, if he retains the property, or does any other act contemplated by the agreement, after the fraud is discovered, he waives his right to rescind, and affirms the agreement. In this case the agreement to sell the goods and receive in payment certain securities, was one transaction; and, whether it would have been admissible to have shown in the present action, and under the pleadings as they appear in the record, that there was a false representation as to one of the securities, and thus lay the foundation for a recovery, admits of much doubt; and I forbear the expression of any opinion upon that point, as it becomes unnecessary, from another view which may be taken of the case.

It is insisted that, if the securities were not received by the plaintiff absolutely as payment, it is competent for him to recover in this form of action, provided the maker of the note was insolvent, and the mortgage security proved insufficient. It is believed that no principle of law is better established, at the present day, than that the giving a promissory note for goods sold, or for any other valuable consideration, is no payment, unless it is specially agreed to be so taken; and, in this respect, it makes no difference whether the note be given for a precedent debt, or for a debt created contemporaneously with the agreement; or whether it be the note of a third person, or of the party to the agreement. The authorities in support of this rule are so numerous, and the rule itself so firmly established, that a reference to many cases is deemed unnecessary. One or two cases in England and this country will, however, be cited, that I may the more readily apply the rule to the present case. In the case of *Owen-sen v. Morse*, 7 T. R., 64, the facts were, that the plaintiff purchased of the defendant some articles of plate, and

*Gardner v. Gorham.*

paid the price of the plate in the notes of the Messrs. Shaws, bankers; they failed before the plate was sent home; and the defendant refused to deliver the same to the plaintiff. Upon the trial of the cause, Lord Kenyon said, that, "if the defendant had agreed to take the notes *as payment*, and to *run the risk* of their being paid, that would have been considered as payment, whether the notes had or had not been afterwards paid; and that is all that is proved by the cases that have been cited; but without such agreement, the giving of such notes is no payment."

In the case of *Johnson v. Weed*, 9 Johns., 310, it appears that Johnson sold the defendant goods, for which he agreed to take the note of John Townsend, which was delivered to him. Townsend failed before the note fell due, and the plaintiff brought his action against the defendant for goods sold and delivered. Chief Justice Kent, before whom the cause was tried, charged the jury "that, unless the plaintiff agreed to receive the note as payment, and to run the risk of its being paid, the mere taking of the note would not amount to payment, if it turned out to be of no value; and that, whether the plaintiff did or did not take the note in question, under such an agreement, was a matter of fact for the jury to find." See also the case of *Porter v. Talcott*, 1 Cow., 359, and the cases there cited.

Applying the principles of these cases to the one at bar, I think enough appears in the bill of exceptions, to have authorized the court below to permit the testimony offered by the plaintiff to go to the jury, whose province it would have been to determine whether it was agreed between the parties that the securities should be taken by the plaintiff as payment for the goods sold, and he should incur the risk of their being paid. It is true that the bill of exceptions states that the plaintiff sold to the defendants

Gardner v. Gorham.

a quantity of goods, "*and received in payment therefor,*" etc.; which would seem to indicate that *payment* was *absolutely* made for the goods, by the assignment of the securities, and that the plaintiff was to run the risk of their collection. But, however strong and clear the language used by the plaintiff may have been, it was, after all, a question of fact for the jury to determine, respecting the real intention of the parties; especially, as other testimony was offered tending to show that it was not contemplated by either of the parties, that the securities assigned to the plaintiff were to be received as absolute payment for the goods sold.

There is another aspect in which this case might be presented, and which would have authorized the admission of the testimony offered by the plaintiff. It is stated in the bill of exceptions that the plaintiff offered to show that he stated to the defendants, at the time the securities were taken, that he received them upon the representations made by the defendants, that they "were good, and well secured on good property;" and that the defendants replied, that "it was all right; and, if it was not, they should feel bound to make it so." Would not a jury have been authorized, from such a statement, to infer that, in case the securities taken by the plaintiff should prove insufficient, they would make good the loss? I think such an inference clearly deducible from such a statement; and if so, the evidence should have been permitted to go to the jury.

It was unnecessary to declare specially, under any view I have been able to take of this case. The contract, on the part of the plaintiff, was completely executed, and if the securities were not received in payment, it was competent for the plaintiff to return them to the defendants, and declare generally for goods sold and delivered. At all events, if it was the understanding of the parties

*Heald v. Bennett.*

that the goods were sold for a stipulated price, and the securities were not intended as payment, it was clearly competent to declare generally for goods sold and delivered; and, by showing the insolvency of the maker of the note, and the worthlessness of the property mortgaged, the plaintiff would be entitled to recover.

The judgment of the Circuit Court must, therefore, be reversed, and the cause remanded, with instructions to issue a *venire facias de novo.*

*Judgment reversed.*

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*Heald v. Bennett.*

A justice of the peace is not authorized, in the absence of special instructions, to receive anything except gold and silver coin of the United States, in satisfaction of a judgment rendered before him; and, if he receive bank-bills, current as money at the time, from a constable who has collected the same on the execution, and enter satisfaction of the judgment, he will be liable to the judgment creditor for the amount, even though he afterwards tender him the bills received, and they become depreciated or worthless.

Neither has a sheriff or constable power to receive anything except the legal currency of the United States, on an execution in his hands for collection, and, if he does so, without special instructions, it is at his own risk.

Error to Berrien Circuit Court. *Assumpit* for money had and received, brought by Heald against Bennett. The facts proved on the trial before E. RANSOM, presiding judge, were as follows: Heald recovered a judgment against one McGiven for \$54.81 damages, and \$2.31 costs, before Bennett, who was an acting justice of the peace. An execution was issued on the judgment, and

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NOTE.—To the same effect, see Welch v. Frost, 1 Mich., 30; 19 Mich., 481; Woodbury v. Lewis, Walk. Ch., 256.

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Heald v. Bennett.

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subsequently returned to the justice who made the following entry on his docket: "Rec'd in full. Execution end satisfied. April 7, 1838." Afterwards, Heald demanded the amount received on the execution from Bennett, who, thereupon, tendered to him bills of the Bank of Lapeer, the Farmers' Bank of Genesee, the St. Joseph County Bank, and the Bank of Michigan, stating that he received them in payment of the judgment. Heald refused to accept the bills tendered. There was also evidence tending to show that the constable to whom the execution was delivered for collection, levied upon, and sold property of McGiven, and took in payment bills of the above mentioned banks, and paid them to Bennett on the return of the execution; and that they were current at the time.

Upon this evidence the court below charged the jury, in substance, "that a magistrate or constable, in the absence of instructions to the contrary, may receive current bank-bills in satisfaction of a judgment; and that, if a justice of the peace, as in the present case, tendered to a party the same funds which were paid to him by the constable, such funds being current at the time they were received, he was not liable to an action for money had and received. But that, if the justice received any kind of property, other than money, he would be liable to the party for the amount of the judgment so paid; and that, if the jury found, in this case, that the defendant had received property other than money, or had received different bank-bills from those tendered to the plaintiff; and had satisfied the judgment, he would be liable to the plaintiff; and that their verdict in such case should be for the plaintiff."

To this charge the plaintiff excepted.

The jury found a verdict for the defendant, upon which

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*Heald v. Bennett.*

final judgment was rendered. To reverse which, the plaintiff removed the cause into this court by writ of error.

*V. L. Bradford*, for the plaintiff in error.

*C. Dana*, for the defendant in error.

**WHIPPLE, J.**, delivered the opinion of the court.

The only question presented for our determination is, whether the instruction given to the jury, by the court below, can be sustained.

The constitution and laws of the United States define what shall constitute a legal tender in payment of debts. By the constitution, Heald had a right to refuse any tender which McGiven might make in payment of the judgment against him, except it was in the gold and silver coin of the United States, made current by law. Was this right to payment in the legal currency, which certainly existed before the judgment was satisfied, impaired or lessened by the circumstance that the constable, by virtue of the execution issued to enforce the judgment, levied upon and sold property of McGiven, and received therefor bank-bills? I apprehend not. No form of proceeding which the local laws of the state may prescribe for the collection of debts, can deprive the party of his constitutional right to demand *money* in payment of his debt. Suppose the officer, after the sale of the property on the execution, had retained the proceeds of that sale in his hands, and refused to pay them over to Heald. It would have been clearly competent for the latter to have instituted a suit against him for money had and received; and any attempt on his part to resist a recovery, by showing a tender in anything except the current coin of the United States, would have been of no avail. The levy and sale made by him discharged the judgment; and the

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Heald v. Bennett.

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moneys arising therefrom, were held by him for the use of Heald. After the payment over of the proceeds of the sale by the officer to Bennett, the justice, the latter occupied the same relation to Heald, that the officer had done before the payment ; and Heald had a right to demand of him gold and silver coin, before discharging him from the debt incurred the moment he entered satisfaction of the judgment on his docket.

Both the officer and justice were, in some degree, the special agents of the plaintiff, the judgment creditor, and had no authority to bind him by agreeing to receive payment in any other currency than that recognized by law. In this respect their authority differs essentially from that of a general agent, who may, by the terms of his agency, be authorized to receive depreciated paper, or any other property, in payment of a debt due his principal. A sheriff, or justice of the peace, may, if he will, receive in payment of an execution, or satisfaction of a judgment, bank-bills ; but, in doing this, he incurs all the hazard incident to such a proceeding. There is no hardship in holding public officers, charged with the collection of moneys, to a rigid responsibility. It is always in their power to protect themselves from that responsibility, by refusing to receive any funds not made a legal tender by law. If they think proper to depart from the strict line of their duty, and unnecessarily involve themselves in difficulty, it is chargeable to their own folly ; but surely the individual to whom the debt is due, ought not to suffer. If such officer bind his principal, by receiving the bills of a bank, why may he not bind him by receiving the bill of an individual ? In principle there is no distinction, except such as may have grown out of the circumstance, that the community are in the habit of regarding as *money*, that which is a mere *promise* to pay money. When the defendant, in the present case, received the bills of rotten

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Heald v. Bennett.

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banks, and entered satisfaction of the judgment in his docket, he became the debtor of the plaintiff, to the amount of that judgment. That debt he had no right to discharge, in the *promises to pay, of banks*; and the plaintiff might reasonably insist that a debt due him of \$54.81, should be paid in that which should be actually worth to him that amount, and not in the promises of the Farmers' Bank of Genesee, and other kindred institutions.

I am, therefore, of opinion that the Circuit Court erred in its instructions to the jury, and that the judgment below must be reversed, and the cause remanded with instructions to issue *venire facias de novo*.

*Judgment reversed.*

**END OF JULY TERM.**



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
STATE OF MICHIGAN,  
IN JANUARY TERM, 1845.

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PRESIDENT:  
HON. EPAPHRODITUS RANSOM, . . . . . CHIEF JUSTICE.  
HON. CHARLES W. WHIPPLE,  
HON. ALPHEUS FELCH,  
HON. DANIEL GOODWIN, } JUSTICES

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Jackson v. Dean.

The question of fraud, arising from a want of delivery and of a continued change of possession of goods sold or assigned by way of security, is, under the statute (R. S. 333, § 4), a question of fact for the jury.

The statute (R. S. 331, § 6) has abolished the distinction sometimes attempted to be drawn between absolute sales, and conditional assignments, and thus avoided the question, whether continued possession in the vendor or assignor, be consistent or inconsistent with the deed.

It declares what shall rebut the evidence of fraud raised by the statute from a want of change of possession, viz.: good faith, and absence of intent to defraud.

It throws the burden of proving such good faith and absence of intent to defraud upon the party claiming under the assignment.

A assigned goods to B, by way of security, which, being allowed to remain in A's possession after the assignment, were seized under an execution against him. *Held*, that B might bring replevin against the sheriff, for the goods, without previously demanding them.

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Jackson v. Dean.

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Error to Lenawee Circuit Court. Replevin by Dean against Jackson, for the taking and detention of a span of horses, harness, carriage, wagon, and several articles of household furniture. Pleas: 1. *Non cepit.* 2. That the goods replevied were the property of one James Love, and that the defendant below, as sheriff of Lenawee county, took them by virtue of an execution in favor of Udolpho Wolfe, against Love. Issues joined thereon.

The cause was tried at the April term, 1843, of the Circuit Court, before the Hon. A. FELCH, Presiding Judge.

It appeared on the trial, that Dean, being the owner of a tavern stand, leased it to Love, who took possession in May, 1840, and continued in possession until December, 1841. In the summer of 1841 Dean applied to Love for payment of the rent. Love paid nothing at the time, but told Dean he would give him security. In September, 1841, when the parties were together at Love's, he turned out to Dean the property in question, as security for the rent due and to become due; the rent then due amounting to something over \$200.

Lewis F. Follett, called as a witness for the plaintiff below, testified that he was present at the delivery of the property to Dean, having been called as a witness to the transaction; that the property was turned out by Love to Dean as security for the rent of the tavern, and was to be Dean's, if the rent was not paid; that no time was specified for the payment of the rent; that Dean requested Love to keep the property and use it, until he (Dean) disposed of it, or made some other arrangement in regard to it. That Love was keeping the tavern and could not well carry on his business without the horses, harness, wagon and carriage; and that all of the property was worth something more than \$200.

It further appeared that Love afterwards retained possession of the property, and used it as he had previously done,

Jackson v. Dean.

until it was levied upon and taken away by Jackson, in December, 1841.

It was proved, also, that in April, 1841, Udolpho Wolfe recovered a judgment against Love for about \$200; and, in December following, took out a *fi. fa.*, and delivered it to a deputy of the defendant below, Jackson, who was then sheriff of Lenawee county, by virtue of which, the property in controversy was levied upon and carried away.

Upon this evidence, the jury, under the charge of the court, found a verdict for the plaintiff below, upon which judgment was rendered.

Whereupon, the defendant below removed the cause into this court by writ of error and bill of exceptions.

The grounds of error relied upon sufficiently appear in the opinion of the court.

*A. M. Baker* and *A. L. Millerd*, for the plaintiff in error:

1. There was a trust for the use of Love, in the transfer from him to Dean, which rendered the transfer void: *Twyne's Case*, 3 Co., 80; *R. S.*, 330, § 1.

2. Under our statute relative to the sale, mortgage or assignment of personal property (*R. S.*, 331, § 6), the question of fraud is for the court, when there is no dispute as to the facts.

After the want of change of possession has been *satisfactorily excused*, the circumstances going to show "good faith," and "no intent to defraud creditors," etc., may be, and doubtless often are, proper matters for the jury; but until such want of change of possession has been satisfactorily excused, as an *affirmative proposition*, on the part of the claimant, the court should not submit the cause to the jury, unless upon clashing testimony as to the excusing circumstances.

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Jackson v. Dean.

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It was so held before the Revised Statutes in New York: *Sturtevant v. Ballard*, 9 Johns., 337, and cases there cited; 2 Coro., 166; 7 Id., 732; 2 Wend., 596. It has also been so held by the Supreme Court of the United States: 1 Cranch, 309.

The Revised Statutes extended the application of the principle to mortgages, etc., but did not alter the rule that the question of fraud, under this statute, was for the court.

The Revised Statutes also made a further requisition upon the claimant of the property under such transfer, viz.: that he should show, affirmatively, good faith and good intentions: 4 Wend., 514; 12 Wend., 297; 16 Wend., 523; 17 Wend., 53; 19 Wend., 444; 21 Wend., 169. The cases of *Hoe v. Acker*, 23 Wend., 653, and *Cole v. White*, 26 Wend., 511, are not of sufficient authority to change the rule heretofore adopted in the courts both of England and America: 1 Hill, 438; 24 Wend., 121, and cases there cited; Opinion by Cowen, J., in 20 Wend., 545; 9 Johns., 337.

3. The evidence in this case did not make a case which, even under the decisions in *Hoe v. Acker*, or *Cole v. White*, should go to the jury.

4. The transfer of the property from Love to Dean, if of any validity, was a *pledge*, and not a mortgage. There is a difference between a *mortgage* and a *pledge*. A *mortgage* is a conveyance of property to be void on payment of a certain sum, *at a certain time*. A *pledge* may be for an *indefinite period*, and then the *pledgor* must be called on to redeem before the *pledge* can be sold: 4 Kent's Com., 139; *Cortelyou v. Lansing*, 2 Caine's Cas., 200; *Garlick v. James*, 12 Johns., 146; *Bronon v. Bennett*, 8 Johns., 96. This being a *pledge*, the *pledgor* had an interest in the property, which was subject to execution at any time: 4 Kent's Com., 139. The general property remains in the *pledgor*: 1 Ait., 167; 5 Johns., 258; 23 Wend., 667; *Cow. Treat., New Ed.*, 302.

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Jackson v. Dean.

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5. But even if it were a *mortgage*, Love had an interest in the property liable to execution. He was a mortgagor in possession, and before forfeiture. No time had been fixed for redemption, and it does not appear that he had even been called on to redeem; of course there had been no breach: 2 *Cow.*, 543; 4 *Wend.*, 490.

6. But even if the defendant in error had been entitled to recover possession of this property, he could not bring replevin, without first demanding it. He could not otherwise recover it of Love, whose possession was lawful; nor could he of the sheriff, who succeeded to all of Love's rights. The action should have been in the *detinet*, and cannot be maintained in the *cepit*.

*A. K. Tiffany*, for the defendant in error. The reporter has not been furnished with a copy of his brief.

RANSOM, C. J., delivered the opinion of the court.

Several points were made at the trial, on which the court was requested to give specific charges to the jury. The principal question, however, arose upon the construction of our statute, relative to fraudulent conveyances and contracts: *R. S.*, 331, § 6; *Id.*, 332, § 4.

It was insisted on the part of the plaintiff in error, that proof of a want of change of possession of the goods turned out or assigned by way of security, was not merely evidence of fraud, to be submitted to the jury, but, unless satisfactorily explained, absolutely established the fraud; and that, under the first clause of the sixth section of the act referred to, that question was to be determined by the court, as a matter of law.

It was also insisted that the presumption of fraud arising from a want of change of possession, after the sale or assignment, was not rebutted by proof of good faith, and absence of an intent to defraud creditors. But the Circuit Court held, and so charged the jury, "that the question

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Jackson v. Dean.

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of fraudulent intent, in relation to said transfer, was one of fact for the jury ; that they were to decide from all the facts in the case, whether the plaintiff (below) had sufficiently explained the want of possession in himself ; that his want of possession was *prima facie* evidence against him, and conclusive, unless explained ; and that they were to determine as to the sufficiency of the explanation, as well as to whether the transfer was made in good faith, or with intent to defraud," etc.

The question here presented is one of great practical importance, and should receive the most careful and deliberate consideration of this court, were it regarded as an open one ; but, since the enactment of the Revised Statutes, it has often been discussed and decided, in the several circuits, where, it is believed, entire uniformity of decision has prevailed ; and this court held, in the case of *Stowell v. Walker*,\* decided here at the last January term, that the question of fraud, arising from want of delivery and a continued change of possession, of goods sold or assigned by way of security, was, under our statute, one of fact for the jury.

The same question has also been repeatedly agitated in the courts of New York. Our statute is a literal copy of the statute of New York ; and, although it received from the Supreme Court of that state, a different construction from the one we have given to it, yet their court of last resort have steadily held, since the decision of *Smith & Hoe v. Acker*, 23 Wend., 653, that fraud, under the statute, was a question of fact for the jury, and not an inference of law to be decided by the court ; and, in the case of *Hanford v. Artcher*, 4 Hill, 271, decided by the

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\* The only point of importance decided by the case of *Stowell v. Walker*, is the one which is here cited to sustain, and, as it was a much less direct and satisfactory authority upon this point, than the present case, it was not deemed advisable to report it among the cases of the last January term.

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Jackson v. Dean.

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Court of Errors, so late as 1842, the whole doctrine, bearing directly or remotely on the construction to be given to the statute in question, is thoroughly sifted, and all the cases, ancient and modern, English and American, are referred to and reviewed.

Lieutenant Governor Bradish, then presiding in that tribunal, in a most elaborate opinion, declares the effect of the statute thus: "In general, this statute, upon due examination and a fair interpretation, will, I think, be found to have accomplished the following important objects, and thus put to rest the vexatious questions long agitated in regard to them, viz.:

"1. It has abolished the distinction sometimes attempted to be drawn between absolute sales and conditional assignments, and thus avoided the question whether continued possession in the vendor or assignor be consistent or inconsistent with the deed.

"2. It declares what shall rebut the evidence of fraud raised by the statute from a want of change of possession, viz.: good faith and absence of intent to defraud.

"3. It throws the burden of proof of such good faith and absence of intent to defraud, upon the party claiming under the sale or assignment. It declares the question of fraudulent intent, to be a question of *fact*, and not of law."

This we recognize as a correct construction of our own statute. The ruling of the court below in the case under review, in no wise conflicts with it, and is also in accordance with the decision of this court, in *Stowell v. Walker*, before referred to.

2. Another point raised and relied upon, was, that the plaintiff below could not recover without having first demanded of the defendant a return of the goods. We think, however, the court below decided correctly, that no demand and refusal, need be proved. By the contract relied upon by the defendant, and which the verdict of the

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*Jackson v. Dean.*

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jury shows to have been proved to their satisfaction, he acquired an immediate right of possession. The goods were left with Love for the time being, as a matter of temporary convenience to the parties, but Dean might have removed them at any time, with or without the permission of Love.

Love's possession, then, was Dean's possession, and the taking and carrying away the property, by the plaintiff, was as much a trespass upon the defendant's right, as though it had been taken from his personal custody.

Several minor questions were raised at the trial, and again urged on the argument in this court, but we think they were all properly decided by the Circuit Court, and require no notice or discussion here.

We are clearly of opinion, that the judgment of the court below, should be affirmed, with costs.

*Judgment affirmed.*

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*Michigan State Bank v. Hammond.*

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**The President, Directors and Company of the Michigan State Bank v. Charles G. Hammond, Auditor-General, Robert P. Eldredge, Secretary of State, John J. Adam, State Treasurer, and Eurotas P. Hastings.**

The principles decided in the case of *The Michigan State Bank v. Hastings and others* (*ante*, p. 225) restated, explained, and affirmed.

Errors in the chancellor's note in *1 Walk. Ch., R. 14*, commenting upon the decision of this court in the case of the *Michigan State Bank v. Hastings and others*, corrected.

The complainants being indebted to the state of Michigan, conveyed to the state in satisfaction of such indebtedness, certain real and personal property. In the agreement by which the property was conveyed, between the complainants and the commissioners empowered by the state to settle with them, it was declared that the assignment of the property was made upon, and subject to, the express condition that the state should indemnify and save harmless the complainants, against certain claims and liabilities therein mentioned. By an act of the legislature, approved February 17, 1842 (S. L. 1842, p. 110), the defendants, the auditor-general, state treasurer, and secretary of state, of Michigan, for the time being, were constituted trustees, on behalf of the state, to take charge of the property assigned, and dispose of it, etc., and pay the proceeds into the state treasury; and as such trustees they entered into the possession of it. Afterwards, the state neglected and refused to indemnify and save harmless the complainants against the liabilities mentioned in their agreement with the state, but suffered a judgment to be obtained against the complainants, on one of those liabilities, which the complainants were compelled to pay. Whereupon, they filed in the Court of Chancery a bill against the defendants, setting forth these facts, for the purpose of obtaining relief out of the property in their hands, against the failure of the state to indemnify, according to the terms of the agreement. On appeal from the decree of the chancellor dismissing the bill,

*Held*, that the conveyance by the complainants, to the state, was upon a condition subsequent;

That the state had failed to perform the condition;

That the property conveyed had thereupon reverted to the complainants, and the state ceased to have any legal interest in it;

That the possession of the defendants was no longer the possession of the state; that they had no longer any power, under the act of February 17, 1841, to control

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*Michigan State Bank v. Hammond.*

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or dispose of the property; and their further acts, in the exercise of such power, were their individual and personal acts, in derogation of the rights of the complainants.

*Held*, therefore, that the Court of Chancery had jurisdiction in this case, and that it could not be objected to that jurisdiction, that the defendants were state officers, acting under state authority; or, that the state was virtually, or must be made, a party to the suit.

It was admitted that the court could not enforce a specific performance of the condition, or covenant to indemnify, contained in the agreement between the complainants and the state, as this could only be done by a proceeding directly against the state, which could not be sued in its own courts.

And, that an objection to the jurisdiction might, perhaps, be successfully urged, against a suit by the complainants against the state treasurer, to recover proceeds of the property conveyed, paid into the state treasury; as he holds money paid into the treasury, not as an individual, but as an officer, acting under authority of the constitution and laws of the state, which makes his possession the possession of the state.

*Held*, further, that, upon the facts set forth in the bill, and a waiver by the complainants of any forfeiture growing out of the breach of the condition upon which they conveyed the property to the state, a court of equity would adjudge the defendants trustees of the property, for the benefit of the complainants; and would direct that the property, or its proceeds, in the hands of the defendants, or so much thereof as might be necessary for that purpose, be converted into money and be applied towards the payment of the damages suffered by the complainants, in consequence of the failure of the state to indemnify them, according to the terms of the agreement between the complainants and the state.

But he who asks equity must do equity; and it appearing by the answer in this case, that the complainants had possession of a considerable portion of the property conveyed, and refused to deliver it to the state, it was held, that such relief would not be granted to the complainants, until they delivered to the state the property so retained by them, and which constituted a part of the fund out of which they were to be indemnified.

*Held*, also, that the complainants would not be entitled to such relief, unless upon a waiver of the forfeiture growing out of the breach of the condition, on which the property was conveyed to the state.

Equity will not lend its aid to divest an estate for the breach of a condition subsequent, although that aid will sometimes be extended to relieve against such a condition.

Appeal from the Court of Chancery. The bill in this case sets forth the same facts as are alleged in the bill

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*Michigan State Bank v. Hammond.*

filed in the case of the *Michigan State Bank v. Hastings and others*, reported *ante*, p. 225 (which was between the same parties), and also contains the additional averment, that, in consequence of the neglect and refusal of the state to indemnify the complainants against the claims and liabilities mentioned in the condition of the indenture or agreement set forth in the bill, a suit at law had been instituted in the Circuit Court for the county of Wayne, against the complainants, on a certain bond executed to, and secured by a mortgage to the Bank of Michigan, and which was one of the liabilities mentioned in said condition, and that the complainants had been compelled to pay said bond, amounting to \$9,699, whereby they had been damnified, etc.

An answer was filed by Hammond, Adam and Eldredge, three of the defendants, which admitted most of the material allegations in the bill, and which the decision of the court renders it unnecessary to notice further than to state that it appeared therefrom, that a considerable portion of the assets assigned by the complainants to the state were, as set forth in the bill, on the execution of the assignment, placed in the hands of Joy & Porter, as attorneys of the state, for collection ; and that said Joy & Porter now refused to deliver them to the said defendants, as trustees for the state, but claimed that they had reverted to the complainants, and that they now held them as attorneys for the complainants, and had the right so to hold them, and to make delivery thereof to the complainants.

To this answer a replication was filed.

Hastings, the other defendant, demurred generally to the bill.

The cause having been heard in the court below upon the bill, answer, replication and demurrer, the chancellor ordered the bill dismissed. (As to the grounds of the chancellor's decision, *vide 1 Walk. Ch. R.*, 9.) To reverse

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*Michigan State Bank v. Hammond.*

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this order, the cause was appealed by the complainants to this court.

*Joy & Porter*, for the complainants.

*Farnsworth*, Attorney-General, and *Van Dyke & Emmons*, for the defendants.

**WHIPPLE**, J., delivered the opinion of the court.

The present case involves the same legal principles which were so ably discussed and so fully considered by this court at its last January term, in another and similar case between the same parties. (*Vide, ante*, 225.) We are now called upon to decide whether the aspect given to the present case, will authorize us in granting the relief prayed for, and which was denied in the former one, for reasons stated in an opinion which I had the honor, as the organ of the court, to deliver.

It becomes necessary, in the first place, to state with clearness the principles established by this court, in the case last mentioned, before entering upon the discussion of those now presented for our decision. In doing this, I have a twofold object in view: One is, to see how far those principles are applicable to the case before us; another is, to correct some misapprehension which seems to have prevailed respecting the scope and extent of that decision. Upon an examination of the opinion it will be found to assert the following propositions:

1. That "the principle is well settled that while a state may sue, it cannot be sued in its own courts, unless, indeed, the state consents to submit itself to the jurisdiction of the court;" *Ante*, 236.

2. That "a person cannot be regarded as a party to a suit, who is not made one by the proceedings in the case, and does not appear in that character upon the record;" *Ante*, 237.

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*Michigan State Bank v. Hammond.*

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3. That, "upon a case made by a bill, showing an entire want of authority on the part of a public officer to do an act, which act, when done, would leave the injured party remediless, a court of equity would grant its injunction to ward off the blow, although the state might be directly interested in having the act done :" *Ante*, 239.

4. That the mere circumstance that a state is interested in the subject matter in controversy, does not, of itself, necessarily oust a court of jurisdiction ; but such jurisdiction will be exercised in a variety of cases particularly referred to in the opinion : *Ante*, 238, *et seq.*

5. "That the estate granted by the complainants was upon condition :" *Ante*, 266.

6. "That, whether the commissioners on the part of the state, had the authority or not, to annex the condition, cannot affect the legal rights of the complainants under the agreement, for the reason that the state had ratified and confirmed the acts of the commissioners, and were bound by the agreement made with the complainants :" *Ibid.*

7. "That the condition in the last clause of the agreement was simply to indemnify :" *Ib.*

8. "That there had been no breach, by the state, of the condition :" *Ib.*

9. "That so much of the act of 17th February, 1842, as rejects the condition, is a nullity, and of no efficacy in the law :" *Ib.*

The decree of the chancellor was affirmed in that case, because it appeared to us that the facts disclosed in the bill did not entitle the complainants to the relief prayed for.

It is now contended by the counsel for the complainants, "that the whole case has been already determined, and that all the facts are now set up, which bring the case within the principles of the decision of the court last

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Michigan State Bank v. Hammond.

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winter." If the counsel intended to assert that this court, in the decision referred to, would have pronounced a different judgment, had the facts which appear in the bill *now* before us, been set out in the bill *then* before us, he certainly asserts what that decision will not justify. I take it for granted, however, that all the counsel intended by the remark was, that, from the principles laid down in that case, it was a fair inference, that the relief sought for would be granted, provided the difficulty suggested by the court was obviated. It is not my habit to decide questions not raised by the pleadings, or to pronounce opinions not called for by the circumstances of the case before me. All the court decided in that case, or intended to decide was, that, admitting the jurisdiction of this court, yet relief could not be extended to the complainants, for the obvious reason that there had, in fact, been no breach of the condition annexed to the estate granted by the complainants to the defendants. But we went further, and suggested that, if "we could so construe the indenture as to intend that, in point of fact, the covenant to *indemnify*, meant a covenant to *pay*, as was the case in *Champion v. Brown*, and *Ranelagh v. Hays*, insuperable difficulties would be interposed in the way of granting the relief sought for:" *Ante*, 263. These difficulties we ventured to hint at, and then used this language: "I have treated the case, thus far, as though the covenant was not inserted in the indenture, as a *condition* annexed to the estate. I have considered it as though it did not, of itself, constitute the condition; and it may be questionable whether, had it been a covenant to *pay*, instead of a covenant to *indemnify*, a court of equity would decree a specific performance. But that question does not necessarily arise, and no decision, therefore, is called for on that point:" *Ante*, 263, 264. These views were announced, to avoid the possibility of mistake, and to admonish counsel that other

Michigan State Bank v. Hammond.

difficulties besides the one on which the opinion of the court was based, might be interposed to defeat the specific relief prayed for in the bill.

I have been induced to be thus particular in stating what was actually decided by this court, at the last January term, for another reason: A volume of the reports of the Court of Chancery, now in the course of publication, having been put into my possession, I observed a note, appended by the chancellor to his decision in that case, commenting upon the opinion of this court, and in which, it is said, that the Supreme Court held that the chancellor had jurisdiction of the case, "and consequently that it was competent for him to have given relief against the state, if complainants had made out a proper case by their bill; that is, had shown themselves damaged by being compelled to pay off the bond and mortgage which the commissioners agreed the state should pay. And *Osborn v. The Bank of the United States*, 9 Wheat., 738, noticed by the chancellor in the concluding part of his opinion, was relied on by the Supreme Court, to show the jurisdiction of the chancellor. They appear, however to have overlooked the broad distinction between the two cases, viz.: that one was a case of *tort*, and the other of *contract*. They admitted that the state could not be sued, and yet held the court had jurisdiction to enforce a contract against the state, in a suit to which the state was not so much as a party. In *Osborn v. The Bank of the United States*, the bank sought relief on the ground that the act of the legislature, under which the officers of the state had acted, was unconstitutional and void; and on that ground, and no other, obtained relief. The acts of a state officer, when unauthorized by the constitution and laws of the state, though done in the name of the state, are his individual acts, for which he alone, in his individual capacity, and not the state, is responsible. Such acts are the

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Michigan State Bank v. Hammond.

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individual acts of the person; and not of the officer in his official capacity, or of the state. While, in the case before them, relief was asked on the ground of a contract with the state, which contract it was insisted was good and binding on the state, and should therefore be performed by the state." *Walk. Ch.*, 14, *note*. Sufficient has been shown to rescue the opinion of the Supreme Court from the absurdities in which it would be involved, if the note of the chancellor contained a correct statement of the views expressed by us. That opinion is the best exponent of the views of this court upon the questions presented for their consideration. Upon reviewing it, I have been unable to discover that it asserts the proposition that "*the state could not be sued, and yet held the court had jurisdiction to enforce a contract against the state, in a suit to which the state was not so much as a party.*" No such absurd doctrine was maintained by this court. It would argue a lamentable ignorance of the most familiar principles, to assert that a Court of Chancery could enforce the specific execution of a contract, as against a state, although the state was not a party to the record. In such a case, it is admitted that a Court of Chancery would, in an attempt to execute such a power, encounter a party who would not silently or tamely submit to its decrees. Again—it is said by the chancellor, that "relief was asked on the ground of a contract with the state," etc. This is but a very partial view of the ground on which relief was claimed. It was insisted, it is true, that the state was bound to perform its agreement with the bank, and indemnify them against the liabilities mentioned in the condition annexed to that agreement; but the special ground relied upon by the complainants was, that, as there had been a violation of that agreement, the property assigned to the state had reverted, and that, under the circumstances, a court of equity might regard

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*Michigan State Bank v. Hammond.*

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the defendants in the light of trustees for the benefit of the bank, and decree, not that the state should execute, specifically, the agreement, but that the property remaining in their hands, should be regarded as a trust fund to indemnify.

I have thought it proper to refer to this criticism of the chancellor, lest our silence might be construed into an acquiescence in its justice. We lay no claim to infallibility, but feel bound to see that our opinions, upon questions so important, should not be perverted; and especially that we should not appear to have entertained and expressed opinions so palpably absurd as those imputed to us. In these remarks I do not intend, as a matter of course, to impute any intentional misrepresentation of my views, to the chancellor, whose high character is sufficient to shield him against such an imputation. But, admitting his right to criticise the opinions pronounced by this court, in the mode adopted by him, we have no other means left of correcting any errors that may lurk in such criticism, than to expose them in such manner as will be most likely to set ourselves right before the public.

With these preliminary remarks, I shall now proceed to consider the only question which, in my opinion, is presented for our decision. Will this court, upon the facts appearing in the bill and answer, direct that the assets now in the hands of the defendants be applied towards the payment of the damages suffered by the complainants, in consequence of the failure of the state to indemnify them according to the terms of the agreement recited in the bill? I have reconsidered, with much care, the opinion of this court pronounced at the last January term, and find no reason for receding from the views we expressed on that occasion. With respect to the question of jurisdiction, which is again pressed upon our notice by the learned counsel in behalf of the defendants, I have to

*Michigan State Bank v. Hammond.*

remark, that I subscribe very fully to almost every principle assumed by them in argument, and the reasoning by which those principles are supported, but will endeavor, presently, to demonstrate that they are inapplicable to the present case. I do not now contend, nor have I ever contended, that it is competent for this court to decree, as against the state, the specific execution of the covenant to indemnify, contained in the agreement between the state and the bank. The opinion, an abstract of which I have given, indicates with sufficient certainty what the opinion of the court upon that question would have been, had it been necessary in order to a decision of the case, that we should pass upon it. Nor do we hold it competent for this court to make a decree against a state officer, acting within the scope of lawful authority, when such decree, although against the officer, would in fact be against the state. We assume no power to do that indirectly, which we may not do directly. But in whom is the legal interest of the property sought to be affected by the decree this court is called upon to make in this case? We endeavored to show, and think we did successfully show, in the former case between the same parties, that the estate granted by the complainants to the defendants, was upon a condition subsequent; and that, up to the time of the filing of the bill in that case, there had been no breach of that condition by the state. We also declared what would be the effect of an actual breach of such condition by the state. We waived the consideration of the question, whether it was competent for the agents of the state to annex the condition, regarding the act of the 17th February, 1842, as a ratification, by the legislature, of the acts of their agents. We also denied the right of the legislature to convert an estate granted upon condition, into an absolute estate, or to reject the condition on the ground that there had been an excess of authority on the part of

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Michigan State Bank v. Hammond.

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its agents ; holding that the estate could not be separated from the condition on which it was granted. We further held, that the possession of the estate, by the state officers, acting under the authority of that act, was in all respects lawful, it being admitted that there had been no breach of the condition by the state. The question now arises, whether the relation of the parties to each other, or to the subject matter in controversy, remains unchanged since the judgment of the court in that case.

What was the legal effect of the neglect or refusal of the state to indemnify the complainants against the judgment rendered against them, on one of the bonds mentioned in the condition of the agreement entered into between the parties, which judgment the complainants aver they have paid ? This question was answered by us in the opinion delivered at the last January term of this court. The estate assigned to the state reverted to the complainants. If so, they are the legal owners of that estate, and are entitled to the remedy which the law affords to reduce it to possession. If this view be correct, the possession of the assigned property by the state officers is not the possession of the state. They no longer hold it, as is contended in the answer, by virtue of the act of the 17th February, 1842. That act conferred a lawful authority of those officers to dispose of the assigned property for the purposes therein set forth, so long as the state itself had the right to that property ; but, when the state, *by its own voluntary act*, becomes divested of all right to the property, when it becomes in fact and in law the property of the complainants, it cannot be said that the possession of the defendants is the possession of the state. That possession, although lawful at the time of the passage of the act, became unlawful when the state forfeited the estate granted to them, by a breach of the condition upon which that estate was granted. Any control over, or dis-

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Michigan State Bank v. Hammond.

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position of the property in question, under the provisions of that act, by the defendants, is in derogation of the rights of the complainants. The defendants can no longer seek shelter, for any acts of theirs in respect to that property, under the provisions of a law which has become inoperative. If this be sound law it follows that all such acts, though done under color of law, in the name of office, are, in fact, the *individual* and *personal* acts of the defendants.

To illustrate my views: Suppose an action for money had and received is commenced by the complainants against the defendants, to recover a sum of money now in their hands, and received by them on one of the securities assigned by the complainants to the state; who can doubt the result? The condition upon which the security was assigned being broken, the right of the state to collect and hold the money is forfeited, and the complainants are permitted to resume rights which they parted with, not absolutely, but conditionally. A court of law would not, for a moment, listen to a defense founded on the allegation that the defendants are state officers, acting by state authority, and are, therefore, protected by their connection with their principal. The answer to such a defense would be, that, as the state had no legal interest in the subject matter in controversy, they are not a necessary party to the suit. This would be the answer to any question of jurisdiction that might be raised; and, the connection between them and their principal being dissolved, they would be regarded as individuals holding money in their hands belonging to the complainants, and a recovery of that money would follow. If the money, to recover which the suit was brought, had been actually paid into the treasury by the defendants, it is admitted that, in a suit brought by the complainants against the state treasurer to recover it, the question of jurisdiction might, perhaps,

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Michigan State Bank v. Hammond.

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be successfully urged. The state treasurer holds the money paid into the treasury, not as an individual, but as an officer acting under the authority of the constitution and laws of the state, which makes his possession of the money the possession of the state; so that the controversy would be, in fact, between the state and the complainants. Yet, the court in which the case might be pending, would entertain jurisdiction of the case, until, in its progress, either the record or the evidence disclosed the facts upon which the question of jurisdiction might arise. There are cases, however, where suits may be successfully prosecuted against a public officer, who, as such, has money in his hands belonging to an individual, and refuses to pay it over: *Priddy v. Rose*, 3 *Meredith*, 102.

The present case, then, and that of *Osborn v. The Bank of the United States*, are not "*as dissimilar as any two cases well could be.*" In the latter case, the original taking of the money from the bank was tortious, being in contravention of an act of congress which was adjudged constitutional. In the present one, the original taking was legal; but the breach of the condition of the agreement under which the state held the property, having worked a forfeiture, the possession of the defendants, as respects the complainant, is wrongful, because against law. In the case of *Osborn v. The Bank of the United States* it was adjudged that, as the taking was in violation of law, trespass might be maintained; and, if trespass could be maintained, then an action on the case for money had and received would also lie. In the case before us trespass could not be maintained, as the original taking was not tortious; but, if the property has reverted to the complainants, for the reason stated, an action on the case for money had and received may be maintained, to recover moneys received by the defendants, upon the assigned assets, subsequent to the forfeiture, and held by them at

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*Michigan State Bank v. Hammond.*

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the commencement of the suit; the money being the property of the complainants, and the holding of the money by the defendants being, as respects the complainants, illegal. Again: The Supreme Court of the United States, in the case of *Osborn v. The Bank of the United States*, held, that a Court of Chancery will restrain an agent from paying over moneys to his principal, if that principal would not be amenable to law. So, in the case before us; if the moneys now in the hands of the defendants, or which may hereafter come into their hands, arising from the sale of the assigned assets, are by them paid into the treasury of the state, it is very doubtful whether it could then be reached, as the state, in whose vaults the money is deposited, is not amenable to law. In the same case the Supreme Court of the United States decided that the agents or officers of the state of Ohio, having done the act complained of in violation of law, were not privileged by their connection with their principal. In the case before us the defendants are no more privileged than were the agents of the state of Ohio; for the reason that they are engaged in disposing of property, under a law, the provisions of which are now inoperative. Without stopping to trace the parallel any farther between the two cases, it is quite clear, that in their prominent features, they are not so unlike each other as was supposed.

Are the complainants, then, upon the case as now presented, entitled to relief? In the former case between the same parties, we held that a court of equity would not lend its aid to divest an estate for the breach of a condition subsequent, although that aid would be sometimes extended to relieve against such a condition. We *cannot*, therefore, decree a forfeiture in the present case; and we certainly *would not*, did we possess the power, as it would operate most inequitably upon the rights of the state. Can we, then, regard the property now under the control

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Michigan State Bank v. Hammond.

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of the defendants, and in their possession, as a trust fund to indemnify the complainants against the losses they may have sustained, growing out of a breach of the condition of the agreement entered into between the complainants and the state? It is admitted that no decree could be effectual against the state. It is also clear that no decree would be made in the case against the present defendants, if the answer disclosed such a state of facts as showed the state to be the party legally interested in the property now in their hands. But the *legal* conclusion, arising from the facts stated in the answer is, that the state has no right to, or *legal* interest in, the property, and that, therefore, the defendants do not hold the same as the agents of the state. The *legal* conclusion is irresistible, provided the ground we have assumed be correct, that the property has reverted to the complainants. That it has reverted, I think is unquestionable. The state of the case then, in a legal point of view is, that the defendants are in possession of certain property, claiming to hold and dispose of the same under the provisions of the act of 17th February, 1842. The right to hold and dispose of the property, in the manner provided in that act, was undoubtedly at the time of its passage. Matters *ex post facto* have arisen, which affect the rights of the parties to that property. The state has, by its own act, divested itself of that property, and the same has reverted to the complainants, just as effectually as though the state had actually returned it to them, after a breach of the condition on which the same was granted. The property, then, is held by the defendants, not as trustees of the state, but as trustees of the complainants, and for their benefit. That part of the act of 17th February, 1842, which transfers the property to the defendants, and directs it to be applied for the benefit of the public, has ceased to have any legal operation, unless it be contended that private property can be taken

*Michigan State Bank v. Hammond.*

for a public use without compensation. Now, if the premises I have laid down be true, it is not clear that an appropriation of the property in question, for the purposes declared in the act, since it has reverted to the complainants, would be a violation of private rights, and against law? If it would, is it not equally clear, that it is the province of this court to interpose its authority, and prevent the defendants from doing an act in violation of law? Such interposition will be justified, unless a court of law is clothed with all the necessary powers to do ample and complete justice between the parties. It may be contended that actions of ejectment might be commenced, and recovery of the real estate had in this way; and that actions of trover, or for money had and received, might be instituted for the recovery of the securities now in their possession, or for moneys in their hands, realized from such securities. But who does not see that such a remedy would operate most oppressively upon the complainants, and most inequitably upon the state? I do not see, therefore, why it is not competent for this court to hold that the property now in the hands of the defendants, be appropriated according to the prayer of the bill. Such a course I think warranted by the case made by the bill and answer, and will best subserve the purposes of justice.

I have not permitted myself to examine into the transactions between the state and the complainants previous to the settlement had between them. The commissioners on the part of the state may have transcended their powers; the settlement itself may have been unwise and inequitable; the commissioners may have made a bad bargain for the state; all this may be very true. But it was in the power of the state to have repudiated that settlement, if there was an excess of power on the part of its agents. This they did not do. On the contrary, they

Michigan State Bank v. Hammond.

affirmed the acts of the commissioners, and adopted the agreement made by them with all its advantages and disadvantages. By that agreement the state must abide.

But, as the complainants ask equity, they must do equity, and place in the hands of the defendants all the property in their custody and possession, or under their control, assigned to the state by the bank. It is averred in the answer, that Messrs. Joy & Porter hold a considerable portion of the property in their hands for the bank. This property, therefore, ought to be delivered over to the defendants, and constitute a part of the fund out of which the bank is to be indemnified. The retention of the property by the bank would be inconsistent with the relief we are disposed to extend to them. Again, the bill does not aver a willingness on the part of the complainants to waive the forfeiture growing out of a breach of the condition of the agreement between them and the state. The complainants are not entitled to relief here unless they will waive the forfeiture. They cannot insist on being indemnified, and avail themselves hereafter of the forfeiture. It may be that, having come into a court of equity for relief, they would be estopped from insisting on the forfeiture. This may, and probably would be the legal effect of the decree we are disposed to make; but to avoid all further difficulty hereafter, there should be an express waiver. A court of equity will, however, hold the defendants as trustees.

GOODWIN, J., being a stockholder in the Michigan State Bank, did not participate in the decision.

After the opinion was delivered, a decree was entered, by the consent of parties, in substance as follows:

It is ordered, adjudged and decreed, that the defendants, Hammond, Eldredge, Adam and Hastings, are, and do stand as trustees of the complainants, and for

*Michigan State Bank v. Hammond.*

their benefit, to the extent hereinafter mentioned, of the property and effects, notes, accounts, real estate, mortgage securities and choses in action assigned and conveyed by the complainants to said Hastings, late auditor-general, and to said Hastings, Thomas Rowland, late secretary of state, and Robert Stuart, late treasurer of the state of Michigan, as set forth in the bill, which may have come into the possession, and are now in the possession of the defendants, or either of them, or their attorneys or agents, or either of them; and also of the proceeds of said property, etc., in their possession or control; and also of all property and securities into which the said property, etc., or any part thereof, may have been converted, or changed, or for which the same may have been sold, by the defendants, or either of them, or which may have been received in exchange therefor, or for any part thereof, and which, at the date of this decree, remain in the hands, or stand in the names of the defendants, or either of them; being the same property, etc., mentioned in the indenture and schedules thereunto annexed, executed on the first day of May, 1840, between the complainants and the said Hastings, Rowland and Stuart, commissioners on behalf of the state, and set forth in the bill of complaint in this cause;

That the complainants do and shall have a lien thereon, to the extent, and for the amount of the damages sustained by them, by reason of the breach of the condition in said indenture;

That it be referred to one of the masters of the Court of Chancery, to ascertain and report to said court the amount of said damages;

That said Hammond, Eldredge and Adam (they assenting thereto), be appointed receivers, under the direction of the Court of Chancery, by one of the masters thereof,

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Michigan State Bank v. Hammond.

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to whom it shall be referred for that purpose, to take possession and charge of said property, etc.;

That, thereupon, an account shall be taken, before such master, of all the property, etc., and that, upon such account being taken, the defendants shall appear before said master and submit to an examination touching all such property, etc., make a full discovery thereof, and, under the direction of said master, assign and convey such property, etc., to the receivers who shall be appointed to take charge thereof, for the purposes of this decree;

That James F. Joy, and George F. Porter, the president of the complainants, shall, in like manner, appear before said master, and submit to like examinations; and that both they and the said complainants, shall, in like manner, assign, transfer and convey to said receivers any of said property, etc., which may be in their control or in the control of either of them, or in the hands of their agents or attorneys;

That the said receivers shall, under the direction of the Court of Chancery, convert said property, etc., into money, so far as may be necessary to satisfy the complainants the amount of damages reported by the master to have been sustained by them, in consequence of the breach of said condition in said indenture, and the interest thereon, and the costs of this suit to be taxed, and out of the proceeds of said property, etc., pay to the complainants the said damages, interest and costs;

That, having paid the same, the said receivers shall assign, convey and deliver all the remaining portion of said property, etc., to the individuals who shall, at that time, hold the offices of auditor-general, secretary of state, and state treasurer of the state of Michigan, or to such other persons as the Court of Chancery may designate and appoint, for the use and benefit of said state;

That, before availing themselves of the benefit of this

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*Stockton v. Williams.*

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decree, the complainants shall file with the register of the Court of Chancery, a stipulation to waive all right to insist upon a forfeiture of any breach of the condition contained in said indenture;

And that the cause and proceedings therein, and this judgment and decree, be remitted to the Court of Chancery for the first circuit, to the intent that such further proceedings may be there had as may be necessary to carry this judgment and decree into effect.

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**Thomas B. W. Stockton and Chauncey S. Payne v. Gardner D. Williams, Kintzing Pritchette, Calvin Smith, Thomas J. Drake and Elizabeth Lyons.**

The reservation by the treaty between the United States and the Chippewa Indians, made at Saginaw, September 24, 1819, of certain designated quantities of land, to be located as the president of the United States might direct, *for the use of persons therein named, and their heirs*, was a reservation of an estate in *fee simple*, to each of the individual reservees.

The treaty itself operated as a grant of land to each of the several reservees, which became perfect when the land was located under the direction of the president of the United States, and no patent was necessary to perfect the title.

*Held*, That a patent issued by the president to a person claiming to be one of the reservees, was void, and could in no wise affect the title of the reservee under the treaty.

Lands may be granted by act of congress, or by treaty, as well as by patent.

A complainant under the act of 1840 (S. L. 1840, p. 127), before he can entitle himself to relief, must show: 1. Possession; 2. A legal or equitable title; 3. A claim set up by some other person; and, 4. His title must be *substantiated*. (a)

A court of equity will not restrain a person from the assertion of a title to real estate, in the course of judicial proceedings, or decree a release by one to another, unless in a case entirely free from doubt.

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(a) See C. L. 1871, § 5072. That possession is necessary, see Blackwood v. Van Vleet, 11 Mich., 262; see also Jones v. Smith, 23 Mich., 320; Devaux v. Mayor of Detroit, Harr. Ch., 96; King v. Carpenter, 37 Mich., 363

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Stockton v. Williams.

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A grant of lands, made while they are in the actual possession of a person claiming under a title adverse to that of the grantor, although void as against such person in possession, is good as between the grantor and grantee. (b)

The grantee could not enforce his rights under the grant, in his own name, but may do so in the name of the grantor; and, if a recovery of possession could be had in his name, the grantee would be entitled to such possession, as the grantor would be estopped from questioning the validity of his own deed. (b)

Equity will not decree a release by A to B, for the reason, merely, that the deed under which A claims was executed while B was in possession of the premises, claiming under a title adverse to that of A's grantor.

*General hearsay* and *public reputation* are inadmissible to prove which of two persons, claiming, by the same name, a particular grant or reservation made by the treaty of Saginaw, was the person intended. (c)

What was said at the time of the treaty, by the parties to it, indicating for whose benefit the grant was intended to be made, is admissible in evidence, on the ground that it constituted a part of the *res gestae*.

A complainant under the act of March 23, 1840 (S. L. 1840, p. 137), is bound to establish a clear legal or equitable title in himself, before he can call upon the defendant to release; and cannot rely upon the weakness of his adversary's title.

**Appeal from the Court of Chancery.** A report of the case in that court will be found in *Walk. Ch.*, 120.

The bill was filed in the Court of Chancery, June 11, 1840, and stated that, by a treaty between the United States and the Chippewa Indians, concluded on the 24th of September, 1819, Mokitchenoqua, *alias* Nancy Smith (and since her intermarriage with Alexander D. Crane, Nancy Crane), became entitled to a section of land near the Grand Traverse of the Flint river. That she was of Indian descent, and the reputed daughter of Jacob Smith, an Indian trader, and that she had always been known and recognized among the Chippewa Indians by the name of Mokitchenoqua. That other sections were reserved at the same place for other persons of Indian descent; and that, to give full effect to the treaty, it became necessary for the executive of the United States not only to cause to be located and surveyed the several sections, according

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(b) See *Bruckner v. Lawrence*, *ante*, p. 19, note b.

(c) Questioned, but followed, in *Campau v. Dewey*, 9 Mich., 322, 422.

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Stockton v. Williams.

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to the object, intent and meaning of the treaty, but also to designate, identify, recognize and put into possession of the different sections, the several individuals entitled to each ; which was attended with many difficulties, by reason of the little intercourse which had existed between the claimants and the Indians on the one hand, and the citizens of the United States on the other ; and because different persons claimed the same land under the same name. That the president caused the several sections that were to be located at the Grand Traverse, amounting in all to eleven, to be surveyed and located under the treaty ; and designated section number eight on the plat of the survey for Mokitchenoqua. That the secretary of the treasury, under the direction of the president, instructed the register and the receiver of the land office at Detroit to investigate and determine the respective persons to whom the lands belonged ; and that they, after investigating the matter, determined Nancy Crane was the person called Mokitchenoqua in the treaty, and certified their determination, and the evidence taken by them, to the general land office at Washington ; which determination, after having been received by the commissioner of the land office, was confirmed August 5th, 1835, and a certificate given on the same day, that Mokitchenoqua, *alias* Nancy Crane, formerly Nancy Smith, was entitled to said section eight, agreeably to the treaty. June 30th, 1835, Nancy Crane and her husband released all their interest to John Garland, from whom the complainants derived their title ; and she and her husband afterwards, February 10th, 1837, deeded two-thirds of the same to Calvin Smith and Thomas J. Drake, who were charged with notice of Garland's deed. That, March 7th, 1840, a patent was issued to Mokitchenoqua, *alias* Nancy Crane, wife of Alexander D. Crane, formerly Nancy Smith. That Elizabeth Lyons, assuming the name of Mokitchenoqua, pretended and

*Stockton v. Williams.*

insisted she was the person meant by the treaty, and presented her claim to the register and receiver at Detroit, who gave her a certificate to that effect, which certificate was afterwards superseded by the certificate given to Nancy Crane. That Elizabeth Lyons, still pretending to have some right or interest, on the 4th of April, 1838, deeded the section to Gardner D. Williams and Kintzing Pritchette, who, in February, 1840, caused an action of ejectment to be brought against the complainant Payne. The bill prayed defendants might be decreed to release their claim to the premises, and Williams and Pritchette be restrained from prosecuting their action of ejectment.

Williams, by his answer, admitted the making of the treaty, the reservation by it of eleven sections of land at the Grand Traverse of Flint river, and that one of the number was reserved for a girl named Mokitchenoqua; but denied Nancy Smith was the person intended, or that she was known by that name among the Chippewa Indians. He also admitted the several sections had been surveyed, marked and numbered, and section eight assigned to Mokitchenoqua under the treaty; admitted the instructions given to the register and receiver of the land office at Detroit, and the patent of March 7th, 1840, as stated in the bill, but insisted that he and Pritchette were not affected by them. Stated that Elizabeth Lyons, the daughter of Archibald Lyons, an Indian trader, was the person intended by the treaty. That Mokitchenoqua was her Indian name, that it was given to her by the Indians when she was an infant, and before the treaty of Saginaw; that the chiefs at the treaty intended to give her a section of land, and that the same was reserved for her by her Indian name of Mokitchenoqua. That she received a certificate from the register of the land office at Detroit; that she was Mokitchenoqua, and that she was the first, and for many years the only applicant, and received her

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Stockton v. Williams.

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certificate of identity August 2d, 1824. That Marie Lavoy received a like certificate February 7th, 1827, and Nancy Crane January 22d, 1831. That Elizabeth Lyons, on the 4th of April, 1838, conveyed to Williams and Pritchette, who had brought an action of ejectment against Payne.

Pritchette put in a similar answer, and the bill was taken as confessed against the other defendants, Elizabeth Lyons, Thomas J. Drake and Calvin Smith.

The testimony in the case (the more material portions of which will be found stated in the opinion of the chancellor in this case, *Walk. Ch.*, 135-139) was very voluminous, and related chiefly to the fact of whether Nancy Smith, *alias* Crane, under whom the complainants claim, or Elizabeth Lyons, under whom the defendants claim, was the person to whom, under the Indian name of Mokitche-noqua, the lands in controversy were intended to be reserved by the third article of the treaty of Saginaw. A statement of the testimony here, does not seem essential to the proper understanding of the questions of law determined by the court.

The cause having been heard in the court below upon the bill, answers and proofs, the chancellor ordered the bill dismissed, as to all the defendants, with costs to Williams and Pritchette, but without costs to the other defendants.

To obtain a reversal of this decree, the complainants appealed to this court.

*A. D. Fraser and T. Romeyn*, for the complainants:

1. The treaty did not vest in the reservees the fee of the land reserved.

The Indian right was one of occupancy merely. Subject to this the ultimate fee was in the United States, and was subject to grant by them: *Fletcher v. Peck*, 6 Cranch,

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Stockton v. Williams.

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87; *Johnson v. McIntosh*, 8 Wheat., 543; S. C., 5 Pet. Cond., 539; *Cherokee Nation v. Georgia*, 5 Pet., 1; *Worcester v. Georgia*, 6 Pet., 515; *Mitchell v. United States*, 9 Pet., 711, 745; 3 *Kenf's Com.*, 377.

By the terms of the treaty, the Indian right was reserved for the use of the reservees. But the land was not granted in fee. The treaty merely *reserved* the right of possession. Examine the words of this treaty in connection with those of the treaty of Chicago. (*Land Laws*, p. 309.) *Godfrey v. Beardsley*, 2 *McLean*, 412, 416. In that case, it was admitted that a mere reservation would not pass the fee. The treaty was held to imply a grant, only by force of the words, "*there shall be granted*." These were properly construed to be words of grant *in praesenti*.

In the present case, the reservation to *Mokitchenoqua* is in the same words as the reservations (*in Art. 2*), of certain large bodies of land to the Indians who made the cession. Will it be contended that, by this reservation, in the 2d article, the Indians acquired the absolute fee of the reserved lands?

The words of the treaty import this, and no more, that the Indians reserved out of the cession certain tracts for designated individuals. The United States, on their part, stipulate to hold them in trust for ("for the use of") the persons named. It is a declaration of trust on the part of the United States. To perfect the title, a patent or conveyance was necessary.

2. If the treaty did not operate *by words of present grant*, then it was necessary to issue a patent to perfect the title of the reservees. These are the only modes by which the fee of the government is divested. The president was bound to see the treaty executed, and the issue of the patent was therefore lawful and proper.

Stockton v. Williams.

3. The patent, being lawfully issued, is conclusive upon the parties in this suit.

Letters patent convey the fee without livery of seizin, even at common law: 5 *Co.*, 94; 2 *Pet. Cond.*, 104. It is a title from its date: 5 *Pet. Cond.*, 272. The grant of a patent is an assertion of the title of the government; and its words convey the same idea: 5 *Pet. Cond.*, 545.

A compliance with the prerequisites of the statute, as to the issuing of a patent, is to be presumed, and is deducible from the patent itself. A grant made by an officer authorized by law to make it, will be presumed to be within his powers: 10 *Johns.*, 23; 3 *Pet. Cond.*, 29; 5 *Pet. Cond.*, 252, 272; 6 *Pet. Cond.*, 357; 1 *Pet. C. C. R.*, 291; 6 *Pet.*, 346, 728, 731; 7 *Pet.*, 51; 8 *Pet.*, 436, 452, 455; 9 *Pet.*, 134; 12 *Pet.*, 437; 13 *Pet.*, 448.

Unless a patent is void *upon its face*, or the issuing of it was without authority, or the state had no title, it cannot be avoided at law: 6 *Pet. Cond.*, 358, and other cases before cited; also, *Harrington Ch.*, 142. The patent should be set aside by a proceeding in a court of equity, or by *scire facias*.

The legal title as evidenced by the patent must prevail: 1 *Pet.*, 664.

If the patent issued by fraud, or on a false suggestion, it was voidable only, and must be impeached by proceedings aimed directly at it: 10 *Johns.*, 26; 6 *Cow.*, 281; 12 *Johns.*, 77; 3 *Pet. Cond.*, 291; 5 *Id.*, 205; 6 *Id.*, 358; 13 *Pet.*, 498; 2 *Saund.*, 177; 2 *Land Laws*, 4; *Jenkins*, 126, *case* 56, 222, *case* 77; *Bruckner v. Lawrence*, *ante*, 19.

A patent having regularly, and according to law, been issued by the government of the United States, for the section of land in dispute, it was incumbent on the

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Stockton v. Williams.

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defendants to get rid of that patent, by taking the proper steps with that view, and showing that the officer who executed the same transcended his powers, or that the transaction was tainted with fraud: *Gresley's Eq. Ev.*, 312; *Co. Litt.*, 225; 5 *Co.*, 53; 13 *Pet.*, 498, 511. And courts will require very full proof before they so determine: 8 *Pet.*, 464; 9 *Id.*, 734.

4. The deed from E. Lyons to Williams is void: 1. Because of the adverse possession of complainants. 2. For champerty.

1. Adverse possession operates as a bar to avoid any deed made by one out of possession; and every possession will be considered adverse until the contrary appears: *Godfroy v. Disbrow*, *Walk. Ch.*, 260; *Bruckner v. Lawrence*, *ante*, 19, and cases therein referred to.

Adverse possession is a question of law to be decided by the court: 5 *Pet.*, 402; and may be set up against any title, either to make out a title under the statute of limitations, or to show the nullity of a conveyance executed by one out of possession: *Ib.; Sch. & Lef.*, 41.

Equity as well as law will *presume* a title in favor of one in possession: 4 *J. C. R.*, 7; 1 *Eden.*, 205, 296; 11 *Eng. Cond. Ch.*, 8, 67, 125.

2. The defendants conceding the occupancy and improvements of complainants, any grant executed by any person other than the latter, except as a release, was void: 4 *Kent's Com.*, 446 to 450; 5 *Johns.*, 408, 504; 1 *Blackf.*, 129; 11 *Johns.*, 97; 13 *Johns.*, 406; 9 *Johns.*, 58, 59; 6 *Cow.*, 680; 5 *Pick.*, 348, 353; 11 *Pet.*, 41, 53; 6 *Id.*, 513; 20 *E. C. L. R.*, 165; 10 *Pet.*, 177; 5 *J. C. R.*, 48, 49; 18 *Ves.*, 120.

A bill to enforce a title acquired by conveyance from a person out of possession of real estate, in consideration of money advanced and to be advanced in suits for the recovery thereof, will be dismissed; for it amounts to

*Stockton v. Williams.*

maintenance, and is the buying of a pretended title: *2 Story's Eq. Jur.*, 313; *3 Jac. & Walk.*, 135, 136; *2 Atk.*, 224.

5. That deed being void, the controversy is solely with Elizabeth Lyons. She has let the bill be taken as confessed, and as against her the complainants are entitled to a decree: *Davis v. Davis*, 2 *Atk.*, 23, 24; *10 Johns.*, 537, 547; *Williams v. Corwin, Hopk.*, 471.

6. The evidence preponderates in favor of the complainants.

Hearsay evidence must be excluded. Indian testimony is entitled to little weight: *Gresley's Ev.*, 237, 361; *Willis*, 550.

*H. N. Walker and W. Hale*, for the defendants.

*H. N. Walker*:

1. Complainants are not entitled to a decree until they show in themselves a perfect and indefeasible title to the premises in dispute.

The statute requires a release to be decreed only when "the complainant shall be able to substantiate his title:" *L.* 1840, 127; and is intended to provide a means of *finally settling* disputed titles. They must show a good title as against all the world.

In bills *quia timet* courts of equity require the utmost strictness, and have even refused relief after *six trials at law*. They will never interfere, as in this case, to *prevent* a trial at law: *2 J. C. R.*, 282; *1 Bro. P. C.*, 266; *1 Vern.*, 266; *2 Atk.*, 483; *3 Johns.*, 590, 594, 595, 601, 602, 603; *1 P. Wms.*, 672, 673, and notes; *8 Cranch.*, 468.

2. The defendants are entitled to the full enjoyment of the land under the treaty of Saginaw.

(1) The interest which passed by the treaty itself was an estate in fee. The terms used are those generally used in Indian treaties. See Book of Indian Treaties, pages 85, 100, 132, 144, 147, 181, 182, 186, 255, 256, 268.

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Stockton v. Williams.

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The words, "to her heirs," create an "estate of inheritance," which is an estate "in fee simple:" 1 *Pow. on Dev.*, 165; 2 *Toml. Law Dic.*, title "Heir;" *Bouv. Law Dic.*, title "Heir;" 4 *Kent's Com.*, 5 to 8.

The treaty has itself been directly passed upon by the attorney-general of the United States (*Land Laws, part 2*, 96, 97), and by the United States Senate (*Vol. 3, Senate Doc.* 1836, No. 197), and in each instance received the construction we claim.

The right of the United States to convey the Indian lands is subject to that of the tribes, and can only be perfected by their action: 8 *Wheat.*, 573; 6 *Pet.*, 544; 7 *Pet.*, 86; 10 *Pet.*, 720, 729, 730; 12 *Pet.*, 438; 9 *Pet.*, 748.

The "right of occupancy," the title of the Indian tribes, is not recognized except as a general right, and is inconsistent with a particular *individual* possession. *That* right, so far as it affects the land in question, was terminated by the treaty which thenceforth confined it to the reservee. If Mokitchenoqua and her heirs have, as is contended, a mere "right of occupancy," that right, being unlimited in extent and duration, and inheritable, is, in terms and effect, an estate in fee.

The reservations, both general and particular, being alike in terms, if one required confirmation, the rest must also. But it will not be contended that the reservation of Indian title to the tribe could require it.

(2) The question, "to whom did the title pass?" must be decided like all other questions of identity, by *evidence*, in the tribunals of justice.

3. There has been no adverse possession long enough to create a right of itself.

4. Complainants, to obtain a decree, must substantiate their title. Even if the deed from E. Lyons were a nullity, the bill of complaint being taken as confessed by her,

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*Stockton v. Williams.*

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would not give them a right to a decree without proving their case. The default of one defendant cannot prejudice others whose defense is the same; neither will it prevent the effect of their defense in defeating a claim against the one in default. Every right must rest on its own foundation, and not on another's weakness. See cases cited in point 1; 2 Ch. Eq. Dig., 889; *Dominicetti v. Latti*, Dick, 588; *Speydall v. Jervis*, *Id.*, 632; *Molesworth v. Lord Verney*, *Id.*, 667; *Plason v. Morris*, 10 Johns., 538, and cases there cited; *Graham v. Elmore*, Harrington's Ch., 265.

5. The deed executed by Elizabeth Lyons was not void as against her and her heirs, if void as against complainants. The defendants have a perfect equity to whatever title she held, and this court will not divest them of it on account of adverse possession: *Livingston v. Peru Iron Co.*, 9 Wend., 516; *Jackson v. Dermont*, 9 Johns., 58, and cases there cited.

6. There has been no adverse possession in this case sufficient to avoid the deed from E. Lyons.

To constitute a good adverse possession for such a purpose, it must have been commenced by the claimant *bona fide*, under a title which he believes, and has reason to believe, a good, perfect, and *entire* legal title. The only claim here set up was an *equity* arising from the certificate of identity. Complainants insist that the legal title was in government until the patent issued, and this deed was issued *prior* to that: *La Frombois v. Jackson*, 8 Cow., 590; *Livingston v. Peru Iron Co.*, 9 Wend., 578; 1 Cow., 286; 9 Wend., 520, 521, 523; 12 Johns., 365; 7 Wend., 151; 9 Johns., 167, 174; 1 N. Y. Dig., 36; 5 Cow., 74; 18 Johns., 40, 355; 4 Johns., 181.

They can derive no benefit from the treaty to aid the adverse possession, as they did not go into possession claiming under it: 9 Wend., 511, and cases above.

Stockton v. Williams.

7. If the title passed by the patent, defendants have no such claim as constitutes a cloud upon title against which equity will relieve. Complainants therefore can have no relief: *Wiggin v. Mayor, etc., of New York*, 9 *Paige* 24; *Van Doren v. Same Defendants*, *Id.*, 389.

8. Adverse possession is no ground of complaint in equity to obtain relief, but only avails as a defense: *Beekman v. Frost*, 18 *Johns*, 544; *Ambler*, 295; 2 *J. C. R.*, 282.

9. The patent is not conclusive against the defendants, but its validity may be inquired into.

The rule of inviolability applies only in cases where the patent is made *under the authority of law, by the officer legally authorized and disposing of property belonging to the government*: 5 *Cranch*, 196; 9 *Cranch*, 98; 15 *Pet.*, 105; 4 *Cond.*, 659, note; 5 *Wheat.*, 293; 3 *Cond.*, 292; 10 *Pet.*, 731; 2 *Pet.*, 236; 1 *Wash. C. C. R.*, 109; 2 *Cond.*, 629; and never against equitable rights originating (as in this case) before its date: 15 *Pet.*, 107, and above cases; 3 *Pet.*, 342; nor when impeached for fraud: 10 *Pet.*, 279; 13 *Pet.*, 450; nor when there are conflicting titles: 13 *Pet.*, 450, 516. Moreover, a treaty is, by the constitution, made the supreme law, and nothing can avail to controvert it. It may pass lands *per verba de presenti*, like any other law. And, if any future action is required, not expressly provided for by it, congress, as the *legislative power*, is alone competent to make the provision, before the president can pretend to act under it: 7 *Pet.*, 89, and above cases.

There is no case cited or to be found in any way sustaining the doctrine that the *authority* of a public officer may not be inquired into, or that his unauthorized acts concerning matters not placed by law under his control and judgment, are binding upon any one.

10. Champerty and maintenance could not at common

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Stockton v. Williams.

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law be made the ground of complaint in equity : 2 *Story's Eq. Jur.*, 311, and 3 *Cow.*, 646, where the doctrine is discussed. The statute on the subject in New York has never been re-enacted here, and we have none.

WHIPPLE, J., delivered the opinion of the court.

The bill in this cause was filed under the provisions of an act, entitled "An act relative to proceedings in chancery," approved March 28, 1840. The first section of the act is in the following words: "Be it enacted, etc., that any person having the possession and legal or equitable title to lands, may institute a suit against any other person or persons setting up a claim thereto, and if the complainant shall be able to substantiate his title to such land, the defendant shall be decreed to release to the complainant all claim thereto," etc.: *S. L. 1840, p. 127.*

1. The first question to be determined is, what estate passed to the reservee under the treaty? The third article is in the following words: "There shall be reserved *for the use of each of the persons hereinafter mentioned, and their heirs*, which persons are all Indians by descent, the following tracts of land," etc. "For the use of Mokitchenoqua, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint river, in such manner as the president of the United States may direct."

It is very clear that, if a fee simple estate was intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its execution. Will, then, the third article warrant such a construction? It will be observed that the reservation is to the use of Mokitchenoqua and *her heirs*. No limitation as to the time of holding, or restriction upon the right of alienation, is contained in the grant. The use of

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Stockton v. Williams.

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the word *heirs*, clearly implies, that such an estate was granted as would, upon her death, descend to her legal representatives. Here then, are all the essential elements of a fee simple estate. This construction, we think, is justified by the words of the third article, and is strengthened by the fact that it corresponds not only with an opinion given by the attorney-general of the United States, to the secretary of war (*Land Laws, part 2, p. 96-7*), but with the opinion of the senate, a branch of the treaty making power, which is certainly entitled to great consideration: *3d vol. Senate Doc. 1836, No. 197*. A further confirmation of this view, may be found by a reference to the numerous treaties made between the United States and the various Indian tribes. In the treaty with the Chickasaw nation, the grant to various persons therein named, is in these words: "One tract of land for the use of Col. George Cobert and heirs," etc. In the treaty with the Osage tribe of Indians, the form of expression is as follows: "From the above lands ceded and relinquished, the following reservations, for the use of the half-breeds shall be made." But it is useless to multiply authorities upon a question which would seem to admit of little or no doubt. I have not been unmindful of the circumstance referred to by counsel, that in other treaties with the Indian tribes, other forms of expression are made use of; such as, for instance, "there shall be granted," etc.; and, "the United States agree to grant, by patent, in fee simple," etc. But we regard the use of such terms as the effect, rather of accident, than design; and in giving a construction to the treaty, we are to be guided by the obvious intention of the parties, and to give effect to such intention. That the intention was, to grant to the reservees named in the third article of the treaty of Saginaw, a fee simple estate, in the lands therein mentioned, we have no doubt.

2. The second question to be decided is, whether the

Stockton v. Williams.

treaty operated as a grant, or whether a patent was necessary to convey the title. This constitutes an interesting feature in the case before us, and was argued with much ability by counsel on both sides; and yet, upon a critical examination of the question, we find no difficulty in arriving at a conclusion entirely satisfactory to our own minds.

It was urged by the counsel for the complainants that, until the patent issued, the fee was in the government. The power of the government to grant the soil while in possession of the Indians, and subject to their right of occupancy, is a proposition which has long since been settled by a series of decisions of controlling authority. It is equally well established that the Indians do not possess the power to dispose of the soil at their own will, to whomsoever they please; upon the principle "that discovery gave exclusive title to those who made it," and to the discoverers belonged the exclusive right of purchasing from the natives: 8 *Wheat.*, 543; 6 *Pet.*, 515. In furtherance of the policy pursued by the United States since its existence as a separate and independent government, a treaty was entered into with the Indians at Saginaw, the object of which was to extinguish their title to the country therein described. Here then were two parties capable of contracting; the one having the legal title and ultimate right to the land which was the subject of the contract; the other having the right of possession or occupancy, which has always been respected. The first article cedes to the United States land comprehended within certain defined boundaries. The second article reserves from the operation of the first, certain tracts of land for the use of the Chippewa nation. The third article makes specific reservations in favor of certain persons of Indian descent. The right of the Indians to the lands described in the second article, was neither enlarged nor

*Stockton v. Williams.*

restrained by its provisions. It left that right precisely as it stood before the cession contained in the first article.

We have already said that the third article contained a grant in fee simple, to the reservees therein named, and we are now to determine whether the treaty operated as a present grant or conveyance to the reservees, or whether further action was required on the part of the government to perfect the title of the reservees to the lands reserved in that article. If it shall appear that the treaty itself operated as an absolute relinquishment of the right, title and interest, as well of the government as of the Indians, to the lands therein described, then it will follow as a corollary to this proposition, that the issuing of a patent to the reservees was unnecessary, and could confer no other or further rights upon them, than were conferred by the treaty itself, and that each must look to the treaty as the source and basis of title to the lands reserved to them respectively. The right of the government to make a grant of lands either by treaty or act of congress, is as unquestionable as the right to make a grant by patent issued by the president when duly authorized by law. What then is the true construction of the treaty in this particular? It is admitted that the language of the third article is somewhat ambiguous, and admits of a twofold construction. In such case it is the duty of the court to give effect to the intention of the parties to the treaty, provided we can discover what that intention was from the article itself; a resort to extrinsic evidence being inadmissible under the rules of law. It was not denied that the article in question operated as an absolute extinguishment of the right which the Chippewas, as a nation, had in the land reserved to the several individuals named in that article. No other or further act on their part was necessary to divest them of their pre-existing right of occupancy, or to invest the reservees, respectively, with all the rights which they, as a

*Stockton v. Williams.*

nation, had before the ratification of the treaty. Being a party to the treaty, the United States sanctioned, by a solemn act, the alienation by the nation, to the several reservees therein named. If such was the legal operation of the treaty in respect to one of the parties, it is difficult to conceive why a like effect may not be given to it with respect to the other. If it operated as a present grant of the rights of the one, to the land in controversy, why may it not be so construed as to have a like operation as to the other? Let us examine, for a moment, the effect of a contrary construction of the treaty; let us see to what consequences it would lead. If the treaty did not, of itself, operate as a present grant to the several individual reservees, in whom, it may be asked, is the title to the tract in controversy? Not in the Indians; for it is admitted that they parted with their interest by the treaty. Not in the government; for it reserved for the use of Mokitchenoqua and her heirs, and is, therefore, excluded from the operation of article first. But it may be said that the title is in the grantees of Mokitchenoqua, to whom a patent issued. But this presupposes a power on the part of the president to issue a patent for the land in question. Did this power exist? If it did, its existence must be shown; for it will hardly be contended that, under our form of government and system of laws respecting the public domain, it is competent for the president to issue a patent without the authority of law. The authority to issue patents is not inherent in the president, but belongs to congress, who have the sole power to determine by whom, and to whom, and upon what conditions, they shall be issued, and to declare their dignity and effect. The third article of the treaty of Saginaw, does not provide that a patent shall issue; and no act of congress has been produced authorizing the president to issue patents to the several reservees named in that article. We are bound,

*Stockton v. Williams.*

therefore, to suppose that the patent issued without any authority, derived either from the treaty or any act of congress designed to carry into effect its provisions, and is, therefore, nugatory and void. If this train of reasoning be correct, it would result that the reservee, Mokitchenoqua, or her assigns, is vested with no other or greater right in the lands in question, than belonged to the Chippewa nation before the ratification of the treaty. And, as congress has passed no law to carry into execution the provisions of the treaty, by authorizing the president to issue patents to the individual reservees, it would follow that the government has never parted with the legal title to the tract in question. But we are bound to resist a construction that would lead to such absurd consequences, if another one, more rational, and warranted by the language of the third article, can be adopted.

The phraseology of the third article might warrant the inference that some legislation was necessary on the part of the government to perfect the titles of the reservees in the treaty. The words, "there shall be reserved," would seem to imply that something further was to be done to perfect the rights acquired under the treaty. But when it is considered that a quarter of a century has elapsed since the treaty was ratified, without any action on the part of congress, in reference to the grants made by the third article, it is almost a necessary inference that the government have given to the treaty the construction contended for by the defendants; that, in respect to such grants, it executed itself. This view derives additional confirmation from the action of the senate, on the report of Judge White, to which I have already adverted.

We think the view we have thus taken cannot be overthrown, by the fact that the lands granted to Mokitche-noqua were to be located "at and near the Grand Traverse of the Flint river, in such manner as the president of the

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*Stockton v. Williams.*

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United States may direct." The location of the lands became a duty devolving on the president by the treaty. This duty he could execute without an act of congress; the treaty, when ratified, being the supreme law of the land, which the president was bound to see executed. It was impossible to describe the tract granted to any of the reservees in the treaty, as it is matter of history that none of the lands ceded had ever been surveyed. But locality is given to the grant by the terms of the treaty, with an authority to locate afterwards by a survey making it definite: 10 *Pet.*, 331. This authority being executed, the grant then became as valid to the particular section designated by the president as though the description had been incorporated in the treaty itself. We are, therefore, of opinion that a fee simple passed to the reservee, Mokitchenoqua, by force of the treaty itself, and that the rights of the parties could in no wise be affected by the subsequent act of the president directing a patent to be issued.

From what has been said, it becomes unnecessary to comment upon that part of the arguments of the counsel for the complainants relating to the acts of high public functionaries acting within the scope of their authority, or of the force and effect of a patent, regularly and according to law issued, by the government. The principles contended for we do not controvert. On the contrary, they receive our unqualified approbation; but are, in our opinion, inapplicable to the present case.

3. We now come to the consideration of those questions which affect, more particularly, the merits of the case. To discuss these questions understandingly, it is important to analyze the provisions of the statute under which the bill is filed. Its language is very comprehensive, and would appear to confer upon the Court of Chancery unlimited jurisdiction in all cases involving the title to real

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Stockton v. Williams.

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property. If a literal construction is to be given to its provisions, a concurrent jurisdiction with the courts of law is given to try actions of ejectment. Whatever may be the true interpretation of the intention of the legislature in passing the act, it is clear that the complainant, before he can entitle himself to relief, must show: 1. Possession; 2. Legal or equitable title; 3. A *claim* set up by some other person; and, 4. *His* title must be *substantiated*. Whether the case made by the bill is such an one as warranted the exercise of jurisdiction by the Court of Chancery, admits of great doubt. Supposing all the facts therein stated to be true, and that a court of equity under the statute, might claim concurrent jurisdiction with the Circuit Court of the county of Genesee, in determining the rights of the parties, yet, it would seem an extraordinary exercise of power to stay the proceedings in that court by injunction, and wrest the case from a tribunal whose peculiar province it is to adjudicate upon precisely such a case as the complainant has made in his bill. The Circuit Court *first* obtained jurisdiction, and we are strongly inclined to believe, that the subsequent exercise of jurisdiction by the Court of Chancery was not warranted by any sound exposition of the statute, and is repugnant to the well established principle that, where there is a concurrent jurisdiction, the right to maintain the jurisdiction attaches to that tribunal which first exercises it. This principle does not apply, it is true, to that class of cases where the remedy is difficult, and the mode of relief inadequate, in the court to which jurisdiction attaches. But we do not see why the Circuit Court of Genesee county could not have settled the rights of the parties in this case, as fully and completely in all respects as a court of equity. Indeed, the only question of fact of any real importance in the case, was as to the identity of Mokitche-noqua, the person under whom both parties claim title to

Stockton v. Williams.

the lands in controversy. The Court of Chancery, in the exercise of its jurisdiction, might very well have submitted to a jury, under a feigned issue, that fact, and thus determined it in the very mode which the defendants, Williams and Pritchette, had selected, by instituting their action of ejectment. If there was anything peculiar in the condition of the property, or if the complainants would be involved in oppressive litigation in asserting their rights, they might claim the assistance of the Court of Chancery, without the aid of the statute; but there is nothing in the present case which distinguishes it from that class which falls under the exclusive jurisdiction of courts of law. The defendant, Williams, however, answered, and submitted the cause to the cognizance of the court, and we are disinclined, especially where there is a doubt as to the true construction of the statute, to permit such a question to be raised at the hearing of the merits. Such a course would be oppressive after a protracted litigation involving the complainants in great expense.

4. It is made a prominent point in the argument of the complainants' counsel, that they are entitled to have the deed executed by Elizabeth Lyons to Williams and Pritchette, declared void, for the reason that it was executed while complainants were in actual possession, claiming under a title adverse to that of the grantor. We are not disposed to review or disaffirm the doctrine laid down in the case of *Bruckner v. Lawrence* (*ante*, 19), referred to by counsel; but the true question is, whether, admitting that the complainants held adversely at the time of the execution of the deed from Elizabeth Lyons to Williams and Pritchette, this court will for that reason, not simply decree the deed void, but also direct a *release* from the grantees in the deed to the complainants. No rule is better established than that a court of equity will not restrain

## Stockton v. Williams.

a person from the assertion of title in the course of judicial proceedings, or decree a release by one to another, unless in a case entirely free from doubt: *Alexander et al. v. Pendleton*, 8 *Cranch*, 220; 3 *Johns.*, 590, 594, 595; 2 *J. C. R.*, 282; 2 *Atk.*, 483. This rule is especially applicable to a case where the right of a party has not been first settled at law. The bill in this case, like that in the case of *Lord Tenham v. Herbert*, 2 *Atk.*, 483, is in the nature of an ejectment bill. If, therefore, it shall appear that, notwithstanding the deed from Elizabeth Lyons to Williams and Pritchette is void as respects the complainants, yet, if they have rights, legal or equitable, which might still be enforced, surely a court of equity will not decree a release, and thus cut off the defendants from establishing those rights, either by an action at law or suit in equity. Apply the contrary principle to the present case, and let us contemplate the consequences which might follow, and the great injustice it might work. Suppose, upon the trial of the ejectment now pending, the court should, as they well might, adjudge the deed from Elizabeth Lyons to Williams and Pritchette to be void. This would defeat their right to recover in that case. But would they, for this reason, be entirely remediless? I apprehend not. The deed as between them and the grantor and her heirs would be good; it conveys all the interest of the grantor to the grantees: 9 *Wend.*, 523; 9 *Johns.*, 58. The grantees could not enforce it in their own names, but may do so in the name of the grantor; and, if a recovery of possession could be had in her name, Williams and Pritchette would be entitled to such possession, as she would be estopped from questioning the validity of her own deed. To authorize a court of equity to decree a release, and thus prevent a party from establishing what might prove to be a valid title at law, would be a stretch of authority which I apprehend finds no support from any

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Stockton v. Williams.

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adjudged case. We cannot, therefore, give such a latitude of interpretation to the statute, as will authorize the court to decree a release for the reason stated. The conclusion to which we have come is supported by a recent decision in New York, in the case of *Kenneda v. Gardner*, 4 Hill, 469. In that case the bill was filed to set aside a deed on the ground: 1. Of fraud; and, 2. Adverse possession. In delivering the opinion of the court, Mr. Justice Cowen said: "The fraud not being proved, the objection that the deed could not avail by reason of adverse possession, belongs exclusively to a court of law."

5. This brings us to the consideration of the last point to be determined: Have the complainants *substantiated their title?* This must depend upon the proofs taken in the case. To review minutely the mass of testimony in the transcript before us, would involve an amount of labor I am not disposed to undertake. A very large proportion of that taken is either irrelevant or incompetent; and it is to be regretted that, in conducting the cause, more regard was not paid to those rules of evidence which are of universal application, and familiar to every lawyer. In this case a vast amount of labor and expense was incurred for no valuable purpose, and the duty devolving both upon the counsel and the court greatly increased, in separating that which is legal and competent from that which is manifestly illegal and incompetent. The testimony on both sides relates principally to the establishment of one fact: *Was Nancy Smith, alias Crane, under whom the complainants claim, the person referred to in the treaty by the Indian cognomen of Mokitchenoqua, or was Elizabeth Lyons, under whom the defendants claim, that person?*

In treating of "the nature and character of the evidence, by which the parties must establish their rights under the treaty," the chancellor decided, that "hearsay evidence is admissible to show which of the two per-

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Stockton v. Williams.

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sons claiming under the treaty by the same name was the person intended." In adopting this rule, the chancellor remarked, "that he could not well see how the right of either could be established without the aid of that kind of evidence. The reservations were donations made by the Indians to the several reservees named in the treaty, and formed a part of the consideration received by them for the lands ceded to the government. They were not the donations of an individual, but of the Chippewa nation, or people, by a public act of theirs, which concerned alike the whole Chippewa nation. This case, then, comes within the exception of the general rule excluding hearsay evidence; which exception admits it on questions of public right," etc. The chancellor again remarks: "General hearsay, or public reputation, at the time of the treaty, among the Indians and others present at the treaty, and among the Indians since that time and before any controversy arose among the different claimants, is good evidence. So is evidence of what a person who is dead has said, who was present at the treaty, and would be likely from that circumstance to know for whom the reservation was made." In applying the foregoing rules to the testimony before him, the chancellor arrived at the conclusion that, "the evidence decidedly preponderates in favor of the defendants." In the present case, there are two persons of the same name, to both of whom the description in the treaty is equally applicable. Extrinsic evidence, then, is competent to show to which of the two the tract in question was intended to be given: *Jackson v. Goes*, 13 Johns., 522. In determining this question, can the rule laid down by the chancellor, upon correct legal principles, be sustained?

"It is a general principle in the law of evidence, that if any fact is to be substantiated against a person, it ought to be proved in his presence, by the testimony of a witness

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Stockton v. Williams.

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sworn to speak the truth :" 1 *Stark. Ev.*, 229. To this general rule, however, there are exceptions as ancient as the rule itself. Does the rule laid down by the chancellor fall within any of the exceptions recognized in the books ?

"Hearsay evidence is the statement which a witness professes to have heard given by a third person as to some particular transaction or thing ; literally, what the witness says he heard another person say :" 1 *Stark. Ev.*, 229. The nature of hearsay evidence, the reasons on which it is generally excluded, and the rules which regulate its admission, are too familiar to need illustration. To justify its introduction, it must be shown to fall within some one of the exceptions recognized by the adjudged cases on that subject. To relax the general rule further than those cases warrant, and admit hearsay, would be dangerous in the extreme, and lead to consequences most disastrous. The exceptions to this general rule are divided by Mr. Greenleaf, in his excellent treatise on evidence, into four classes : *First*, those relating to matters of public and general interest ; *Secondly*, those relating to ancient possession ; *Thirdly*, declarations against interest ; *Fourthly*, dying declarations, and some others of a miscellaneous nature. The admission of a part of what is properly hearsay evidence, was allowed by the chancellor upon the supposition that it related to matters of public and general interest. Keeping in view the fact sought to be proved, was such evidence admissible upon the ground stated ?

"The terms *public* and *general* are sometimes used as synonymous, meaning, merely, that which concerns a multitude of persons :" *Greenl. Ev.*, 152. Hearsay is admitted in this class of cases upon the principle that, "in matters of public interest, all persons must be presumed conversant :" *Id.* "And, as rights which are common are

Stockton v. Williams.

naturally talked of in the community, what is thus dropped in conversation may be presumed to be true :" *Id.*, 153. But hearsay under this head, "is admitted *only in the case of ancient rights*, and in respect to the declarations of *persons supposed to be dead* ;" the origin of the right being antecedent to the time of legal memory, and incapable of proof by living witnesses : *Id.*, 154. Another restriction upon the admission of evidence of reputation, in such cases is, that the declarations so received must have been made *ante litem motam*. In matters of mere *private right*, evidence of reputation or common fame is inadmissible. The reasoning of Lord Kenyon on this point is as follows : " Evidence of reputation, upon general points, is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions ? How is it possible for strangers to know anything of what concerns only private titles :" 1 *Stark.*, 35. Reputation with respect to *particular facts*, is also inadmissible. " As, where the question on the record was, whether a turnpike was within the limits of a certain town, evidence of general reputation was admitted to show, that the bounds of the town extended as far as a certain close ; but not that formerly there were houses where none then stood :" *Greenl. Ev.*, 163. The particular subjects to which such evidence is applicable, are public prescription, customs relating to boundary, manors, parishes, highways, and the like : 1 *Stark.*, 30. The general rule to be extracted from the books is, that facts, which, from their nature or antiquity, do not admit of proof by living witnesses, may be proved by hearsay evidence.

Having hinted at some of the rules which regulate the

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Stockton v. Williams.

admission of general reputation in matters of public and general interest, and enumerated the subjects to which such evidence is usually applicable, we are now to consider whether hearsay "evidence was admissible to show which of the two persons claiming under the treaty, by the same name, was the person intended." We are of opinion that this *particular fact* could not be established by evidence of *general reputation*. The treaty itself was a public transaction; it was, perhaps, a matter of public and general interest; but it can hardly be said that the fact submitted for our decision, as to whether Nancy Crane or Elizabeth Lyons, was the person to whom the grant was made, by the Indian name of Mokitchenoqua, would be likely to excite public interest. It is a question in which the public could take no interest, because they had no *rights*; it was not a matter, therefore, in respect to which "all persons must be presumed to be conversant." There could be no "prevailing current of assertion" to resort to as evidence, and it is to this, "that every member of the community is supposed to be privy, and to contribute his share." 1 *Greenl. Ev.*, 153. Again, such evidence is admitted *only in the case of ancient rights*. Now, the transaction to which this evidence refers took place in the year 1819, and the bill in this cause was filed in the year 1840. The right, therefore, is not an ancient one, and incapable of direct proof by living witnesses. We are clearly of opinion, for these and other reasons that might be urged, that the fact to be determined was not of *public and general interest*, and could not be proved by evidence of *general reputation*. That the question of identity is not susceptible of proof by the application of the ordinary and general rules of evidence, may be matter of regret; but the evil consequences growing out of a relaxation of those rules, far outweigh any mischief that may result to either party from a rigid enforcement of them.

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Stockton v. Williams.

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But, it is said "that general hearsay, or *public reputation*, at the time of the treaty, among the Indians and others present at the treaty, and among the Indians since that time, and before any controversy among the different claimants, is good evidence." The rule thus laid down by the chancellor, we think, is too broad. The treaty was a public transaction; the parties to it were the government of the United States, represented by its commissioner, and the Chippewa nation, acting through its chiefs or principal men. Now, it is quite clear that what was said, *at the time*, by the parties to the grant, indicating the particular individual for whose benefit that grant was intended to be made, would be admissible, on the ground that what was then said constituted a part of the *res gestae*. To the admission of such evidence there could be no objection. But we are at a loss to discover upon what principle the declarations of either the Indians or any other persons, made subsequent to the treaty, could be received to prove the fact as to which of the claimants was intended by the parties to it. The present case affords a capital illustration of the danger of admitting such evidence. It is highly probable that both the original claimants were present at the treaty, and numerous witnesses testify, not only what was said *contemporaneously with the principal fact done*, but as to what was said by Indians and others many years thereafter. Now, these witnesses differ essentially as to which of the claimants was intended by the *Indians*, while there is scarcely a syllable of evidence as to who was intended by the *other party* to the grant. This circumstance alone would weaken very much the force of such evidence, even if it were admissible. But we have sought in vain for authority, either in the elementary works or reports of adjudged cases, to warrant the introduction as evidence, of the hearsay of individuals touching the particular fact in question. We must, there-

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Stockton v. Williams.

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fore, reject all evidence of this description, unless the declarations sought to be introduced can be regarded as a part of the *res gestae*.

Applying, then, these legal principles to the testimony before us, but little is left upon which this court can act. The acts of the register and receiver of the land office can have no influence in determining the question of identity. They acted, it is true, under the instructions of the treasury department, but their adjudication can have no binding force on the parties. The treaty did not provide a mode for adjudicating upon the question submitted to them, and parties claiming rights are necessarily remitted to the judicial tribunals of the country, whose judgments alone are binding and authoritative. On the part of the complainants there are numerous witnesses who testify that Jacob Smith had an Indian daughter, called Mokitche-noqua, while there are but two or three witnesses, Cecil Boyer and Macons, whose testimony is regarded as admissible to establish the fact that she was the person to whom the grant was intended to be made. That Elizabeth Lyons' Indian name was Mokitchenoqua, appears to be satisfactorily established. It is also clear that she was at the treaty. The testimony of Campau, Cochois, Trudell, Knaggs and As-sin-o-ka-man, tends to establish the fact that she was the individual referred to in the treaty. We have given to the whole of the testimony a very careful examination, and without recapitulating that testimony here, or entering into a critical examination and analysis of its contents, with a view to determine whether it preponderates in favor of the complainants or defendants, we are all clearly of the opinion, that the complainants have not "substantiated their title to the land," by evidence so clear, satisfactory and convincing as to authorize us to decree a release by the defendants. From the view we have taken of the statute under

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*Stockton v. Williams.*

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which the bill was filed, it is unnecessary to determine whether the defense made by Williams and Pritchette inures to the other defendants. We are inclined, with the chancellor, to think that it does. But it is sufficient for the purposes of this case to say, that the bill is in the nature of an ejectment bill, and the complainants in the case, like plaintiffs in an action of ejectment in a court of law, are bound to establish a clear legal or equitable title in themselves, and cannot rely upon the weakness of their adversary's title. Not having done this, we feel bound to affirm the decree of the Court of Chancery, and permit the parties, if they see fit, to resort to another tribunal, where the questions of fact arising in the case, can be more satisfactorily settled

*Decree affirmed.* .

[REMAINDER OF JANUARY TERM IN NEXT VOLUME.]



# INDEX.

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## ACKNOWLEDGMENT.

See ARBITRATION, 1.

## ACTION.

See ASSUMPTION, 1. CONTRACT, 2. JOINDER OF ACTIONS.

## ADJOURNMENT.

See PRACTICE, 12.

## ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS, 1, 2.

## ADMIRALTY.

See MARITIME LAW, 2, 3.

## ADMISSION.

See EVIDENCE, 3. PAYMENT, 1.

## ADVERSE POSSESSION.

1. A grant of land (except as a release) is inoperative and void, if, at the time of the grant, the lands are in the actual possession of another person, claiming under a title adverse to that of the grantor.—*Bruckner's Lessee v. Lawrence*, 19.
2. A grant of lands, made while they are in the actual possession of a person claiming under a title adverse to that of the grantor, although void as against such person in possession, is good as between the grantor and grantee.—*Stockton v. Williams*, 546.
3. The grantee could not enforce his rights under the grant, in his own name, but may do so in the name of the grantor; and, if a recovery of possession could be had in his name, the grantee would be entitled to such possession, as the grantor would be estopped from questioning the validity of his own deed.—*Idem*.
4. Equity will not decree a release by A to B, for the reason, merely, that the deed under which A claims was executed while B was in possession of the premises, claiming under a title adverse to that of A's grantor.—*Idem*.

## AGREEMENT.

See ARBITRATION, 1, 4, 5. CONSIDERATION, 1, 2. MICHIGAN STATE BANK, 1 to 9. PRINCIPAL AND AGENT, 1, 2.

## AMENDMENT.

1. Where a plaintiff suffers ten days to elapse after p[re]lief of the general issue without amending his declaration, his right to amend of course, under the 27th rule of the circuit courts, becomes extinguished. *Held*, therefore, that, after a trial of the issue, verdict for the plaintiff, verdict set aside, a new trial granted, leave given to the parties, by special order of the court, "to file new pleadings under the general rules," an amended declaration filed under this order, and demurrer thereto, the plaintiff had no right to file a second amended declaration without special leave granted by the court.—*People v. Judges of Washtenaw Circuit Court*, 45.
2. A declaration may be amended by adding new counts, so as to lay the contract or wrong in a different manner, but a new cause of action can be introduced by amendment.—*Idem*.

See ATTACHMENT, 4, 5. JOINDER OF ACTIONS, 2. PRACTICE, 2.

## APPEAL

1. This court will not dismiss an appeal from a decree of a court of chancery, on motion of the appellees, on the ground that the appellant, having made default in a court below, had no right of appeal, unless the decree recite all those facts, which, by the rules and practice of the court of chancery, entitle a party to default his adversary.—*Stephens v. Townsend*, 77.
2. The decree of the court of chancery appealed from in this cause, recited, that the "cause having been heretofore brought on to be heard and decided, upon the agreement and stipulation of the said Townsend, and the complainants, and the answer of the said Townsend, and upon exhibits read by stipulation and consent, and the said bill having been taken as confessed against the said Colby and the said Bumpus" (co-defendants with Townsend), "and upon hearing Mr. Lane and Mr. Buckbee, of counsel for the complainants, and no person appearing to argue the said cause on the part of the defendants, and due deliberation being there-upon had," etc. *Held*, that it did not show such a default of the defendant, the appellant, and abandonment of his cause in the court below, as would deprive him of the right of appeal to this court.—*Kewa*.
3. The court decline expressing any opinion, in this case, as to whether there are any, and if any, what restrictions upon the right of appeal to this court, from the court of chancery, conferred by the statute (R. S. 397, § 121), but infer from a review of cases decided by the court of errors in New York, touching the right of appeal to that court, where the appellant has made default in the court below: 1. That the restrictions upon the general right of appeal to that court, result principally from that provision of the constitution of New York, which makes it imperative upon the chancellor, and upon the judges of the Supreme Court, to inform the court of errors of the reasons of their judgments; and, 2. That if the

- error alleged, in the appellate court, could not have been obviated in the court below by proof or amendment, had objection been there made, the appeal will be sustained.—*Idem.*
4. The statute (R. S., 880, § 197) is not *mandatory*, but merely *authorizes* the chancellor to sit with the justices of the Supreme Court, and inform them of the reasons of his decree or order, on the hearing of an appeal therefrom to the Supreme Court.—*Idem.*
  5. A plaintiff, against whom judgment of nonsuit has been rendered in a justice's court, on his failure to appear and prosecute his suit on the day of trial, cannot appeal the case to the Circuit Court; such judgment not being a *final* judgment within the meaning of the statute: S. L. 1841, p. 107, § 94.—*Bowne v. Johnson*, 125.
  6. This court has no power, in a case brought here by appeal from the Court of Chancery, to grant a motion made by the appellant, for leave to supply, by a sworn copy, a master's report in the cause, discovered after taking the appeal, to have been lost from the files of the court below.—*Sears v. Schwarz*, 504.
  7. It seems that the Court of Chancery would have power to grant such a motion, even after the appeal, for the purpose of giving effect to it.—*Idem.*

#### ARBITRATION.

1. Where the execution by one of the parties, of an agreement under the statute (R. S. 581), to submit matters in difference to arbitration, appears to be by an agent, the certificate of the officer taking the acknowledgment of the agreement, that such party appeared before him, by such agent for that purpose duly appointed and acknowledged the same, is sufficient evidence of the execution of the agreement, and of the authority of the agent, to authorize the arbitrators to hear and determine the matters submitted to them, and the Circuit Court to render judgment upon their award.—*City of Detroit v. Jackson*, 108.
2. The award of arbitrators, under the statute, is an official act, and is itself the evidence and authority, upon which the Circuit Court may render judgment.—*Idem.*
3. A judgment, rendered upon an award, pursuant to the statute (R. S. 582), will not be reversed on error, on the ground that it does not appear that an agent, who executed the agreement for submission on behalf of one of the parties, had authority so to do, where the award recites, that such party was duly notified of the hearing before the arbitrators, and appeared, and was heard with his witnesses and counsel, and where, being deemed in court by the statute (R. S. 582, § 10), he allowed the judgment to be entered on the award, without objection on the ground of such agent's want of authority; but the court will infer from these facts a recognition and adoption, by the party, of the act of his agent, in executing the submission, even where such party is a corporation.—*Idem.*
4. An agreement, under the statute (R. S. 581), to submit matters in difference to arbitration, need not be under seal.—*Idem.*
5. A judgment, rendered in favor of A and B, against C, upon the award of arbitrators, on filing the same pursuant to the statute (R. S. 582, § 9), will not be reversed on error, on the ground that B had no claim against C, he having joined

with A in executing the submission to arbitration, of all matters arising out of a contract between A and C, for the faithful performance of which contract by A, he was recited in the submission to be bound to A by a separate instrument, and the award having been made in favor of both A and B.—*Idem.*

#### **ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**

See **PARTNERSHIP**, 1, 2, 3, 4.

#### **ASSUMPSIT.**

If goods be sold on a credit, the vendor cannot, before the credit has expired, maintain **assumpsit** for goods sold, even though he can prove that the vendee induced him to sell the goods by fraudulent representations.—*Galloway v. Holmes*, 330.

See **ERROR**, 3, 4. **PLEADING**, 11, 12.

#### **ATTACHMENT.**

1. In a suit commenced by writ of attachment under the statute (R. S., 506), the plaintiff in the writ cannot declare for a cause of action which did not accrue until after the writ was issued.—*Galloway v. Holmes*, 330.
2. The discontinuance of a suit in attachment by the original plaintiff, will not impair the right of a creditor who has previously filed his declaration in the cause, to proceed to judgment, nor affect his lien upon the property attached.—*People v. Judges of Calhoun Circuit Court*, 417.
3. Where one creditor only obtains a judgment in a suit commenced by writ of attachment, it is not necessary that the order of sale of the property attached, authorized by the statute (R. S., 511, § 17), should require the money arising from the sale to be paid into court; but if it require the same to be paid to the plaintiff, this will not vitiate either the order, or the proceedings under it.—*Idem.*
4. This court will not grant a **mandamus** to compel the Circuit Court to set aside a sale of property attached, to satisfy a judgment in that court in a suit commenced by attachment, on the ground that the sheriff's return does not show all the steps required by law to make a valid appraisal and sale to have been taken, where it is made to appear, by affidavit of the sheriff, that such steps were in fact taken.—*Idem.*
5. The Circuit Court might, upon application, founded upon such affidavit, grant an amendment of the sheriff's return. This court, however, has no power to grant the amendment.—*Idem.*
6. A judgment in a suit commenced by writ of attachment, will not be set aside for irregularity, on the motion of a person to whom the property attached had been conveyed by the defendant, after service of the attachment, but who is a stranger to the record.—*Idem.*
7. The bond required to be executed by a non-resident plaintiff in attachment, his **agent or attorney**, prior to the issuing of the writ (S.L. 1842, p. 118, § 3), may, when executed by such agent or attorney, be, in form, his personal obligation, and be executed by him in his own name, describing himself as such agent, and not in the name, or on behalf of his principal, the plaintiff in the attachment.—*Walbridge v. Spalding*, 451.

8. Such bond is not vitiated by the omission, in the body of it, of the Christian name of the principal obligor, he having executed the same by his full name.—*Idem.*
9. Where such bond is not in the name of the plaintiff in the attachment, but is the personal obligation of his agent, no power under seal need be shown, authorizing its execution by the agent.—*Idem.*

See JURISDICTION, 5. PRACTICE, 14, 15.

#### ATTORNEY.

The attorney of record cannot be made personally liable to the clerk of the court for his fees, for services rendered on behalf of the client in the progress of the cause, unless upon proof of his express promise to pay them, or of some practice, or course of dealing, between him and the clerk, from which such personal promise can be implied.—*Preston v. Preston*, 822.

#### ATTORNEYMENT.

See LANDLORD AND TENANT, 1, 2, 3.

#### AWARD.

See ARBITRATION, 1, 2, 3, 5.

#### BAILMENT.

See CARRIER, 1, 2, 3, 4. FREIGHT, 1, 2.

#### BALLOT.

See ELECTIONS, 1 to 6.

#### BANKS AND BANKING ASSOCIATIONS.

1. A bill of exchange directed to "John A. Welles, cashier *Farmers & Mechanics' Bank of Michigan*," and accepted by writing across the face thereof, "Accepted, John A. Welles, cashier," is drawn upon, and accepted by the bank, and not by Welles in his individual capacity.—*Farmers & Mechanics' Bank v. Troy City Bank*, 457.
2. The extent of the general powers of the cashier of a bank, is a question of law, and not of fact; and a charge is erroneous, which refers it to the jury to determine whether a cashier, as such, had power to accept certain bills for the bank.—*Idem.*
3. The cashier of a bank has no power to accept bills of exchange, on behalf of the bank, for the accommodation, merely, of the drawers; and the holder, with notice, of bills so accepted, cannot recover against the bank.—*Idem.*
4. It seems that persons dealing with a bank, are presumed to know the extent of the general powers of a cashier.—*Idem.*

See CONSTITUTIONAL LAW, 3. CORPORATION, 5, 7, 8, 9 11. GENERAL BANKING LAW, 1, 2, 3.

## BASTARDY.

A defendant who is found guilty and adjudged the father of a bastard child, and chargeable with its maintenance, on complaint under the provisions of chapter 6, title 2, part 1 of the R. S., is not liable for the costs of the proceeding.—*Booth v. McQueen, 41.*

## BILL OF EXCEPTIONS.

See PRACTICE, 18.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In a suit upon a promissory note, made by the defendants, in consideration of the plaintiff's forbearance to seize certain property on attachment against his debtor, the onus of proving that the debtor had, at the time, no interest in the property, and that, therefore, the note was without consideration, is upon the defendant.—*Rood v. Jones, 123.*
2. An instrument signed officially by the president and secretary of a corporation, requesting its treasurer to pay to *X.* or bearer, a certain sum of money, is a bill of exchange drawn by the corporation upon itself.—*Hacey v. White Pigeon Beet Sugar Company, 123.*
3. No formal acceptance of such a bill is necessary, the act of drawing being deemed an acceptance of it.—*Idem.*
4. Such a bill is the same in legal effect, as a promissory note; it imports a promise to pay on demand, and an action may be maintained upon it without proof of a demand of payment from the treasurer of the corporation.—*Idem.*
5. Notice to an indorser of a promissory note, that the note "has been protested for non-payment, and that the holders look to him for payment of the same," is not a sufficient notice of dishonor.—*Platt v. Drake, 296.*
6. Such notice must contain words, directly, or by necessary construction, showing that the note has been presented for payment and payment refused.—*Idem.*
7. A protest is a formal instrument, made by a notary public, alleging the due presentation and dishonor of a bill, and declaring that the notary protests the same for non-acceptance or non-payment, as the case may be; and the statement that a bill or note has been protested, refers rather to the making, by a notary, of the instrument denominated a protest, than to the acts which might authorize such protest to be made.—*Idem.*
8. No protest of a promissory note is necessary.—*Idem.*
9. The sufficiency, in itself, of a written notice of dishonor, is to be determined by the court as matter of law.—*Idem.*
10. A person to whom a promissory note has been indorsed in payment of a pre-existing debt, is a holder for a valuable consideration, and is not affected by any equities between the antecedent parties, where he has received the note before it became due, without notice of such equities.—*Bostwick v. Dodge, 413.*

11. It is not necessary that a copy of the protest of a foreign bill should accompany the notice of dishonor.—*Atwater v. Streets*, 455.

See BANKS AND BANKING INSTITUTIONS, 1, 2, 3. GENERAL BANKING LAW, 2, 3. PAYMENT, 2.

#### BOATS AND VESSELS.

See PLEADING, 10.

#### BOND.

See ATTACHMENT, 7, 8, 9.

#### BOUNDARY.

See DEED, 1. EVIDENCE, 1.

#### BREACH OF CONDITION SUBSEQUENT.

Equity will not lend its aid to divest an estate for the breach of a condition subsequent, although that aid will sometimes be extended to relieve against such a condition.—*Michigan State Bank v. Hammond*, 587.

See MICHIGAN STATE BANK, 2, 7, 9.

#### CARRIER.

1. Plaintiffs, by their agent, shipped goods at Port Kent, on Lake Champlain, consigned to them at Marshall, Michigan, care of H., C. & Co., Detroit, by the New York & Michigan Line, who were common carriers, and with whom they had previously contracted for transportation of the goods to Detroit, and paid the freight in advance. During their transit, and before they reached Buffalo, the goods came into the possession of carriers doing business under the name of the Merchants' Line, without the knowledge or assent of the plaintiffs, and were by them transported to Detroit, consigned by H., P. & Co., of Buffalo, to the care of the defendants, and delivered to the defendants, who were personally ignorant of the manner in which they came into the possession of the Merchants' Line, and of the contract of the plaintiffs with the New York & Michigan Line, although they and H., P. & Co. were agents for and part owners in the Merchants' Line. The defendants being warehousemen and forwarders, received the goods and advanced the freight upon them from Troy, N. Y., to Detroit. On demand of the goods by the plaintiffs, the defendants refused to deliver them until the freight advanced by them, and their charges for receiving and storing the goods, were paid; claiming a lien upon the goods for such freight and charges. In replevin brought for the goods, *Held*, that the plaintiffs were entitled to the possession of the goods without payment to the defendants of such freight and charges, and that the defendants had no lien upon the goods of the same.—*Fitch v. Newberry*, 1.
2. A common carrier is bound to receive and carry goods, only when offered for carriage by their owner or his authorized agent, and then only upon payment for the carriage in advance, if required.—*Idem*.
3. If a common carrier obtains possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value.—*Idem*.

4. To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between their owner and the carrier, so that an action at law might be sustained for the payment of the debt sought to be enforced by the lien.—*Idem.*

See FREIGHT, 1, 2. MARITIME LAW, 1, 3.

#### CASHIER.

See BANKS AND BANKING ASSOCIATIONS, 1, 2, 3, 4.

#### CERTIORARI.

See JURISDICTION, 5. PRACTICE, 14, 15, 16.

#### CHANCERY.

1. A complainant under the act of 1840 (S. L. 1840, p. 127), before he can entitle himself to relief, must show: 1. Possession; 2. A legal or equitable title; 3. A claim set up by some other person; and, 4. His title must be substantiated.—*Stockton v. Williams, 546.*
2. A court of equity will not restrain a person from the assertion of a title to real estate, in the course of judicial proceedings, or decree a release of one to another, unless in a case entirely free from doubt.—*Idem.*
3. A complainant under the act of March 28, 1840 (S. L. 1840, p. 127), is bound to establish a clear legal or equitable title in himself, before he can call upon the defendant to release, and cannot rely upon the weakness of his adversary's title.—*Idem.*

See ADVERSE POSSESSION, 4. APPEAL, 1, 2, 3, 4, 6, 7. BREACH OF CONDITION SUBSEQUENT, JURISDICTION, 1, 2. MICHIGAN STATE BANK, 3, 4, 10, 11, 12, 14, 15. PARTNERSHIP, 5.

#### CHARTER.

See CONSTITUTIONAL LAW, 2. CORPORATION, 3 to 11.

#### COMPLAINT.

See CRIMINAL LAW. PLEADING, 10.

#### CONDITION.

See BREACH OF CONDITION SUBSEQUENT. MICHIGAN STATE BANK, 1, 2, 6 to 9. SALE OF CHATTEL, 3.

#### CONFLICT OF LAWS.

See FOREIGN LAW, 1.

#### CONSIDERATION.

1. An agreement by the plaintiff with the defendant, to forbear suit against a third person, who was the plaintiff's debtor, is a good consideration for the defendant's promise to pay the debt.—*Rood v. Jones, 183.*
2. A creditor's agreement to forbear seizing certain property on attachment against his debtor, will not support a promise, by a third person, to pay the debt, if, at the time, the debtor had no interest in the property.—*Idem.*

SEE BILLS OF EXCHANGE AND PROMISSORY NOTES, 1. GUARANTE.

## CONSTITUTIONAL LAW.

1. The power vested in congress by the federal constitution (art. 1, sec. 7), "to provide for the punishment of counterfeiting the current coin of the United States," may be exercised by the several states concurrently with congress.—*Harkiss v. The People*, 207.
2. The jurisdiction of the federal courts over offenses against the laws of congress providing for the punishment of counterfeiting the current coin of the United States, is not exclusive of the jurisdiction of the state courts, over offenses against state laws, making it punishable to counterfeit such coin.—*Idem*.
3. The repeal of the charter of a banking corporation, which contains no reservation of the power to repeal, is a violation of that provision of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts, and is therefore void."—*Michigan State Bank v. Hastings*, 225.

See GENERAL BANKING LAW, 1 to 8. LIMITATIONS, STATUTE OF, 2. MICHIGAN STATE BANK, 6. STATE OF MICHIGAN. TERRITORY OF MICHIGAN.

## CONSTRUCTION OF WRITTEN INSTRUMENTS.

See DEED. LANDS AND LAND TITLES, 3, 4. PRINCIPAL AND AGENT, 1, 2.

## CONTRACT.

1. Fraud does not render a contract void, but merely voidable, at the option of the defrauded party.—*Galloway v. Holmes*, 330.
2. If the defrauded party elect to affirm the contract, he is bound by it in all respects.—*Idem*.
3. If a vendor having a right to rescind a contract of sale of goods, on account of the fraud of the vendee in making the purchase, brings *in debitis assumpsit* to recover the price of the goods, he thereby affirms the contract.—*Idem*.
4. Where there is an *express* contract, none can be *implied*.—*Idem*.
5. Where the defrauded party rescinds an *express* contract, he cannot set up an *implied* one, and sue the other party thereon.—*Idem*.

See ASSUMPSIT. CARRIER, 1, 2, 4. CONSIDERATION. CORPORATION, 11. FOREIGN LAW, 1, 8. GUARANTY. LANDLORD AND TENANT, 3. PRINCIPAL AND AGENT, 1, 2. SALE OF CHATTELS.

## CONVEYANCE.

See ADVERSE POSSESSION. DEED. EVIDENCE, 1, 6. LANDS AND LAND TITLES, 1, 2, 5. MICHIGAN STATE BANK, 1, 2, 6, 7, 9. PATENT FOR LAND. TAX TITLES.

## CORPORATION.

1. A corporation may appoint an agent by parol.—*City of Detroit v. Jackson*, 102.

3. The authority of an agent of a corporation, may be inferred from the adoption or recognition of his acts by the corporation; and the acts so recognized or adopted will bind the corporation.—*Idem.*
3. Where, in an act of incorporation, it was provided that the same should be void, unless a certain sum of money was paid in as part of the capital stock of the corporation, within two years of its passage, it was held, that, after five years had elapsed from the expiration of that period, it was too late to institute proceedings to obtain a forfeiture, on account of omission to comply with such provision.—*People v. Oakland County Bank*, 222.
4. The court will lay down no universal rule in such cases, but will decide whether the delay has been unreasonable or not, from the circumstances of each case.—*Idem.*
5. An act repealing the charter of the "Bank of Oakland County," cannot be construed to be a repeal of the charter of "The President, Directors and Company of the Oakland County Bank."—*Idem.*
6. It is not necessary that a repealing act should correspond exactly, in naming the corporation, with the act of incorporation which it is meant to repeal; but there must be such a correspondence as will leave no doubt of the intention of the legislature.—*Idem.*
7. Where, by its charter, a bank is located in one county, and it establishes an agency in another county, where it receives deposits, and buys and sells exchange, it thereby violates its charter.—*Idem.*
8. The buying exchange by a bank is, in effect, discounting paper.—*Idem.*
9. Semble, that a bank may lawfully have an agency to receive its bills, at a place other than that in which it is located by the charter.—*Idem.*
10. Quere as to whether *quo warranto* or *scire facias* be the proper remedy by which to proceed against a corporation, for violating its charter.—*Idem.*
11. Where, by the charter of a bank, it was provided that it should be capable of purchasing, holding, and conveying real estate for its use, but that the real estate which it should be lawful for the corporation to hold, should be only such as was required for its accommodation in relation to the convenient transaction of its business, or such as might have been bona fide mortgaged to it by way of security, or conveyed to it in satisfaction of its debts previously contracted in the course of its dealings, or purchased at sales upon judgments which might have been obtained for such debts, Held, that the bank had no right to purchase lands for the purpose of selling them again; and that a contract entered into for that purpose was unlawful, and courts would not aid either party to enforce it against the other.—*Bank of Michigan v. Niles*, 401.
12. On plea of general issue to an action by a corporation, the plaintiffs must prove their corporate existence in the same manner as though *real fict* corporation were pleaded.—*Farmers & Mechanics' Bank v. Troy City Bank*, 457.

See ARBITRATION, 3. BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 3, 4. CONSTITUTIONAL LAW, 3. ERROR, 2. EVIDENCE, 7. GENERAL BANKING LAW, 1, 2. WARRANT OF ATTORNEY, 1.

Costs are in consequence of some default, and are not awarded by the common law, but depend entirely upon statutory provisions. Where no authority is given by statute, there can be no taxation.—*Booth v. McQueen*, 41.

See **BASTARDY**. **PRACTICE**, 1, 2. **ATTORNEY**.

#### COUNTERFEITING.

See **CONSTITUTIONAL LAW**, 1, 2. **INDICTMENT**, 3, 4.

#### COVENANT.

See **MICHIGAN STATE BANK**, 3, 4, 5. **PLEADING**, 7.

#### CRIMINAL LAW.

The return of a court of special sessions to a *courtiorari*, stated that on complaint for larceny, L. P. and one R. C. were jointly arrested and jointly examined, and that a separate trial was granted to L. P. on request of her counsel, merely, *Held*, equivalent to a statement that they were jointly charged in the same complaint with the commission of the same offense.—*Pullen v. The People*, 43.

See **CONSTITUTIONAL LAW**, 1, 2. **EVIDENCE**, 2. **INDICTMENT**, 1 to 4.

#### DEBTOR AND CREDITOR.

See **ASSUMPTION**, 1. **PARTNERSHIP**, 1 to 4. **CARRIER**, 4.

#### DEED.

In the construction of grants, both course and distance must give way to natural or artificial monuments or objects; and courses must be varied, and distances lengthened or shortened, so as to conform to the natural or ascertained objects or bounds called for in the grant; but where there is nothing in the conveyance, to control the call for course and distance, the land must be run according to the course and distance given in the description of the premises.—*Bruckner's Lessee v. Lawrence*, 19.

See **ADVERSE POSSESSION**. **EVIDENCE**, 1. **LANDS AND LAND TITLES**, 2, 5. **PATENT FOR LAND**. **TAX TITLES**.

#### DEFAULT

See **APPEAL**, 1, 2.

#### DELIVERY.

See **FRAUDULENT CONVEYANCES OF PERSONAL PROPERTY**.

#### DEMAND.

See **REPLEVIN**.

#### DEPOSITION.

See **EVIDENCE**, 8.

## INDEX.

## DETROIT, LAND TITLES IN.

See LANDS AND LAND TITLES, 1, 2.

## DETROIT YOUNG MEN'S SOCIETY.

See STATE OF MICHIGAN,

## DISCRETION.

See Error 1.

## ELECTIONS.

1. The statute makes the evidence contained in the ballots of voters, the foundation of the statements to be prepared both by the inspectors of election and by the county canvassers, and also of the certificate of election issued by the latter.—*People v. Tiedale*, 49.
2. The ballots of the electors, as shown by the statements of the inspectors of election, are the only evidence upon which the county board of canvassers can act. They have no power to examine witnesses, or receive other evidence, to prove for whom a ballot was intended.—*Idem*.
3. Nor would any other evidence be admissible, on a trial before a jury of an issue awarded from this court, in a proceeding by information in the nature of a quo warranto to try the right to an office; but the simple inquiry would be, what was the intention of the elector, expressed by his ballot.—*Idem*.
4. A ballot for *J. A. Dyer*, cannot be counted for *James A. Dyer*. It does not contain the name, the designation by written characters, of *James A. Dyer*; and no evidence is admissible to show that it was intended for *James A. Dyer*.—*Idem*.
5. But where the designation of an individual, on a ballot, is by an abbreviation sanctioned by common usage and universally understood, the ballot may be counted for the person for whom it was evidently intended. Thus, a vote for *Jas. A. Dyer*, may be counted for *James A. Dyer*.—*Idem*.
6. Nor, it is presumed, would a slight error in the spelling of a name, on a ballot, prevent the ballot from being counted for the person for whom it was evidently intended.—*Idem*.

## EQUITABLE LIEN.

See MICHIGAN STATE BANK, 2, 12. VENDOR AND PURCHASER.

## ERROR.

1. Error cannot be assigned, in the decision, by the court below, of a motion, founded upon affidavits, to vacate a judgment; such motion being addressed merely to the sound discretion of the court.—*City of Detroit v. Jackson*, 106.
2. Where it was assigned for error, that the plaintiffs below, who sued as a foreign corporation, did not prove themselves such by legal and competent evidence, and, their charter not being set forth in the bill of exceptions, the court was unable to determine whether the evidence (which was an exemplified copy of their charter,

and proof of acts of user under it), was sufficient or not; it was held, that in support of the judgment, the evidence would be presumed sufficient.—*Farmers & Mechanics' Bank v. Troy City Bank*, 457.

3. *Assumpsit* for goods sold. Plea, general issue. On the trial, the plaintiff offered evidence showing that he sold goods to the defendants for a stipulated price, and received therefor certain securities, executed by third persons; that he collected one of the securities, but that the other was worthless, and he afterwards offered to return it to the defendants. In connection with this, he also offered other evidence, from which it was doubtful whether it was agreed between the parties that the securities should be received in payment, or not. The court having rejected the evidence, it was held, on error, that if there was no agreement between the parties, that the securities should be received in payment, the evidence offered would have entitled the plaintiff to a verdict; that whether there was such an agreement or not, was a question for the jury; and as it might have been inferred from the evidence offered, that there was none, its rejection was erroneous.—*Gardner v. Gorham*, 507.
4. Held, further, that it was not necessary for the plaintiff to declare specially in such a case.—*Idem*.

See ARBITRATION, 3, 5. JUSTICE OF THE PEACE, 1 to 4. PLEADING, 12. PRACTICE 8, 9, 12, 16, 18. WARRANT OF ATTORNEY, 1.

#### ESTATE.

See LANDS AND LAND TITLES, 3. MICHIGAN STATE BANK, 1, 9.

#### ESTOPPEL.

See ADVERSE POSSESSION, 2, 3.

#### EVIDENCE.

1. When a boundary of land conveyed by patent from the United States is described by course and distance, terminating at a post, and neither any marks indicating such boundary, nor any post indicating its termination, are to be found on the land, and no evidence is adduced, showing where such post was originally placed; parol evidence, that a line was found marked upon the trees upon the land, but variant from the call of the patent, and not indicated by the monument called for in the patent, was the actual line surveyed, run and marked as such boundary, by the government surveyor, will not be admitted to alter or vary the boundary, as described by course and distance in the patent.—*Bruckner's Lessee v. Lawrence*, 19.
2. Where two persons are jointly charged in the same complaint with the commission of the same offense, and neither of them has been either acquitted or convicted, the husband of the one is not a competent witness for the other, who, by leave of the court, is tried separately.—*Pullen v. The People*, 48.
3. Evidence of the statement of an agent, made nine months after he had sold property for his principal, that he knew at the time of the sale that it was good for nothing, is inadmissible to affect the rights of his principal.—*Horner v. Fellows*, 51.

4. Words spoken by the defendant, after the commencement of the suit, are not admissible in evidence to show malice, in an action of slander, unless they expressly refer to those which are the subject matter of the action, and do not constitute a distinct calumny for which the plaintiff would have a separate right of action.—*Taylor v. Kneeland*, 67.
5. Parol evidence is admissible, to prove official character.—*Scott v. Detroit Young Men's Society's Lessee*, 119.
6. Held, that certain parol proof, and also a resolution of the governor and judges of the territory of Michigan, offered in evidence for the purpose of showing an assignment by them prior to 1836 of certain premises, were irrelevant and inadmissible.—*Idem*.
7. A person who is a stockholder in a corporation, and, as such, liable individually for its debts, is a competent witness for the plaintiff in a suit against such corporation. His interest is against the plaintiff, and he is not, by being such stockholder, a party to the suit.—*Hasey v. White Pigeon Beet Sugar Company*, 193.
8. By the statute (R. S., 434, § 94), objection on the ground of interest, to the competency of a witness whose deposition is taken in a cause, must be made at the taking of the deposition, or it will be deemed waived.—*Idem*.
9. A justice of the peace entered across a judgment on his docket, that it was paid, stating the day, and signed the entry in his official capacity. Held, that such entry was *prima facie* evidence that the judgment was satisfied, and that this evidence was not rebutted by proof, unaccompanied by an explanatory testimony, of another entry immediately below the former, on the same docket, without date, and signed by the justice in his individual capacity, stating, in effect, that the judgment had not been paid, according to the import of the former entry.—*Beach v. Botsford*, 199.
10. The transactions and acts of a corporation may be proved by entries made in its books.—*People v. The Oakland County Bank*, 288.
11. Debt on a judgment rendered before a justice of the peace. The plaintiff having proved the judgment by the docket of the justice, the defendant gave in evidence an entry on the same docket, showing that the cause was, on a day named, removed to the Supreme Court by certiorari. To rebut which, the plaintiff proved an order of the Supreme Court, made about the same time, dismissing from the docket of that court, a cause having the same title. Held that, *prima facie*, the order was in the same cause in which the judgment of the justice was rendered.—*Howard v. Rockwell*, 315.
12. Held, also, that the order was a decision of the Supreme Court, that the cause had not been, in fact, removed from the justice into that court, and that the judgment of the justice was in full force.—*Idem*.
13. In an action for slander, evidence of the truth, or tending to prove the truth of the slanderous words, is inadmissible under the general issue in mitigation of damages.—*Thompson v. Bowers*, 321.
14. So, also, evidence that the specific facts in which the slander consisted, were communicated to the defendant by third persons.—*Idem*.

15. In an action for slander, the plaintiff, after having proved the words alleged, may give in evidence other slanderous words of like import, with a view to show the malice of the defendant.—*Idem*.
16. *General hearsay* and *public reputation* are inadmissible to prove which of two persons, claiming, by the same name, a particular grant or reservation made by the treaty of Saginaw, was the person intended.—*Stockton v. Williams*, 56.
17. What was said at the time of the treaty, by the parties to it, indicating for whose benefit the grant was intended to be made, is admissible in evidence, on the ground that it constituted a part of the *res gestae*.—*Idem*.

See ARBITRATION, 1, 3. BILLS OF EXCHANGE AND PROMISSORY NOTES, 1. CORPORATION, 12. ELECTIONS. FOREIGN LAW, 3. FRAUDULENT CONVEYANCES OF PERSONAL PROPERTY, 3, 4. JURISDICTION, 9, 10, 11. JUSTICE OF THE PEACE, 7, 8. OFFICER, 1. POWER, 2. TAX TITLES.

#### EXECUTORS AND ADMINISTRATORS.

1. It may well be doubted whether an administrator is authorized, in any case, to give credit, upon the sale of real estate of the intestate for the payment of his debts, under an order or license of a Court of Probate; and whether, if he does so, he is not chargeable with the price, as money in his hands for the creditors and others who may be entitled to it.—*Palmer and others, Appellants*, 42.
2. If, on a sale of real estate of an intestate, under an order or license of a Court of Probate, the administrator gives credit for a part of the purchase money, and takes indorsed notes of the vendee as security for the payment of the same, thereby parting with the equitable lien upon the land, and any portion of the amount so secured is lost by the subsequent insolvency of the parties to the notes, the administrator will be personally answerable to the estate for such loss; and this, though when the notes were given, the parties to them were in good credit, and reputed to be responsible, and there has been no *laches* in using the legal means for collecting them, and although, in consequence of the credit given, the price obtained for the property, exceeded what it would have brought on a sale for cash, by an amount greater than the amount lost by the failure to collect the notes.—*Idem*.

#### FALSE REPRESENTATION.

See SALE OF CHATTELS. ASSUMPTION.

#### FORCIBLE ENTRY AND DETAINER.

See LANDLORD AND TENANT, 2.

#### FORECLOSURE.

See MORTGAGE OF LANDS.

#### FOREIGN LAW.

1. A law of New York, which would enable a vendor, of whom goods had been purchased fraudulently on a credit, to maintain *assumpsit* against the vendee for the price of the goods, before the credit had expired, would be a law affecting the

remedy only, and would not apply so as to enable the vendor to maintain a similar action in this state, to recover the price of goods sold in New York.—*Galloway v. Holmes*, 330.

2. But, Held, on a review of the cases, that such was not the law of New York.—*Idem*.
3. On demurrer to a declaration upon a contract made in the state of New York, and specifying no particular place of performance, Held, that the court would not take judicial cognizance of a law of New York, which, applied to the contract, would render it void; but that the defendant in order to avail himself of such law, must, upon a proper issue, prove it as a fact to the court; and that, until this was done, the court would test the validity of the contract by the laws of this state.—*Jones v. Palmer*, 379.

#### FORFEITURE.

See MICHIGAN STATE BANK, 1, 2.

#### FORFEITURE OF CHARTER.

See CORPORATION, 3, 4.

#### FRAUD.

See ASSUMPTION. CONTRACT, 1, 2, 3. FOREIGN LAW, 1, 2. FRAUDULENT CONVEYANCES OF PERSONAL PROPERTY. PARTNERSHIP. PATENT FOR LAND. SALE OF CHATTELS.

#### FRAUDS, STATUTE OF.

See GUARANTY.

#### FRAUDULENT CONVEYANCES OF PERSONAL PROPERTY.

1. The question of fraud, arising from a want of delivery and of a continued change of possession of goods sold or assigned by way of security, is, under the statute (R. S., 428, § 4), a question of fact for the jury.—*Jackson v. Dean*, 515.
2. The statute (R. S., 381, § 6) has abolished the distinction sometimes attempted to be drawn between absolute sales, and conditional assignments, and thus avoided the question, whether continued possession in the vendor or assignor, be consistent or inconsistent with the deed.—*Idem*.
3. It declares what shall rebut the evidence of fraud raised by the statute from a want of change of possession, viz.: good faith, and absence of intent to defraud.—*Idem*.
4. It throws the burden of proving such good faith and absence of intent to defraud upon the party claiming under the assignment.—*Idem*.

#### FREIGHT.

1. Freight *pro rata itineris* is due, when the ship, by inevitable necessity, is forced into a port short of her destination, and is unable to prosecute the voyage, and the goods are there voluntarily accepted by the owner.—*Rossiter v. Chester*, 154.
2. The owner of goods was deemed to have voluntarily accepted them at the intermediate port, when, knowing that the voyage had been abandoned, its further

prosecution having become impossible, or extremely hazardous, he there demanded his goods from the agents of the forwarders, with whom they were stored, tendering payment of their charges for storage, and brought replevin to recover possession, on the refusal of such agents to deliver them.—*Idem.*

See CARRIER, 1, 2, 4.

#### GENERAL AVERAGE.

See MARITIME LAW, 1, 2.

#### GENERAL BANKING LAW.

1. So much of the "Act to organize and regulate banking associations" (S. L. 1887, p. 76), as purports to confer corporate rights upon the associations organized under its provisions, is in violation of the second section of the twelfth article of the constitution of this state, which declares that "the legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house," and is, therefore, void.—*Green v. Graves*, 351.
2. So much of the "Act to organize and regulate banking associations" (S. L. 1887, p. 76), as purports to confer corporate rights upon the associations organized under its provisions, being unconstitutional and void (*Green v. Graves*, ante 351), such associations are not *moneyed corporations*; and, therefore are not within the provision of the safety fund act (S. L. 1886, p. 155, § 81), which prohibits such corporations from issuing their bills or notes, unless the same be made payable on demand without interest.—*Farmers & Mechanics' Bank v. Troy City Bank*, 457.
3. *Quere*, whether a bill of exchange, drawn by an association organized under the general banking law, acting as a corporation, could be treated as legal and valid, and an action maintained upon it against the acceptors.—*Idem.*

#### GOVERNOR AND JUDGES.

See TERRITORY OF MICHIGAN, 1 to 4. LANDS AND LAND TITLES, 1.

#### GUARANTY.

1. A, being indebted to B, transferred to him, in part payment of such indebtedness, the note of C, and indorsed on the back thereof a written guaranty of its payment. *Held*, that the guaranty was an original undertaking founded upon a new and sufficient consideration, and therefore not within the statute of frauds.—*Jones v. Palmer*, 379.
2. *Held*, also, that it was not essential to the validity of the guaranty that the consideration should be expressed therein; but that the same might be proved by parol; and this notwithstanding the guaranty was expressed to be "for value received."—*Idem.*

#### IDENTITY.

See EVIDENCE, 16, 17.

#### INDEMNITY.

See MICHIGAN STATE BANK, 8, 13, 14.

## INDICTMENT.

1. In an indictment under the statute (S. L. 1840, p. 48, § 1), which provides for the punishment "of larceny, by stealing of the *property of another*," "*any bank note, bank-bill*," etc., a description of the property stolen as *bank-notes* or *bank bills*, merely, following the language of the statute, is sufficient.—*People v. Kent*, 42.
2. An allegation in such indictment, that the bank-bills were the *goods and chattels* of W. and K. is a sufficient averment that they were *their property*. The word *chattels* denotes property and ownership.—*Idem*.
3. An indictment for violating the laws of this state against counterfeiting (R. S., 638, §§ 16, 18), properly charges the offense to have been committed against the sovereignty of the people of this state, instead of charging it to have been committed against the sovereignty of the people of the United States.—*Harken v. The People*, 207.
4. An indictment under the statute (R. S., 638, § 18) for knowingly having in possession instruments adapted and designed for making counterfeit coin, to wit: Mexican dollars, with intent to use the same, need not allege that the defendant was not employed in the mint of the United States.—*Idem*.

## INFERIOR COURTS.

See JURISDICTION, 3, 4, 6, 7, 8, 11. JUSTICE OF THE PEACE.

## INFORMATION.

See QUO WARRANTO.

## INTRUSION INTO OFFICE.

See QUO WARRANTO.

## IRREGULARITY.

See PRACTICE.

## JETTISON.

See MARITIME LAW, 1.

## JOINDER OF ACTIONS

1. An action founded upon a statute, cannot be joined with an action at common law.—*People v. Judges of Washitaewa Circuit Court*, 434.
2. Held, therefore, that counts in debt to recover the penalty for usury under the statute (R. S., 161, § 7), could not be amended by substituting counts for money had and received.—*Idem*.

## JOINT WRONG-DOERS.

See CRIMINAL LAW. EVIDENCE, 2.

## JUDGMENTS AND EXECUTIONS.

See APPEAL, 5. ATTACHMENT, 6. EVIDENCE, 9, 12. JUSTICE OF THE PEACE, 5, 6, 7. OFFICER, 1, 2.

## JURISDICTION.

1. A state cannot be sued in its own courts; but this rule applies only where the state is a party to the record; and where the defendants were the late auditor-general, and his successor in office, the secretary of state, and state treasurer, and the complainant's bill sought to reach property held by them in their official capacity. *Held*, that the Court of Chancery had jurisdiction, although the state might be interested in the subject matter of the suit.—*Michigan State Bank v. Hastings*, 235.
2. The rule which prohibits a Court of Chancery from making a decree unless all those who are substantially interested be made parties to the suit, is inapplicable in a case where it is not in the power of the complainants to make them parties.—*Idem*.
3. Inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority conferred upon them.—*Wight v. Warner*, 334.
4. The facts necessary to give them jurisdiction must appear affirmatively in their proceedings, and cannot be presumed; but, jurisdiction being acquired, it will be presumed to have been rightfully exercised, unless the contrary appears by error affirmatively shown.—*Idem*.
5. The return of a justice of the peace to a *certiorari* showed that the suit was commenced by writ of attachment, but it did not appear therefrom that any affidavit was filed, or any bond executed, as required by the statute, before the writ was issued. *Held*, that these facts could not be presumed, as they were necessary to give the justice jurisdiction in the case and that the judgment of the justice for the plaintiff, must, therefore, be reversed.—*Idem*.
6. Inferior courts of special and limited jurisdiction, are confined strictly to the powers conferred upon them, and their proceedings must appear to be within those powers.—*Clark v. Holmes*, 390.
7. When proceeding to exercise their powers, they must have jurisdiction of the person, by means of the proper process or appearance of the party, as well as of the subject matter of the suit; and where they have not such jurisdiction, their proceedings are absolutely void, and cannot afford any justification or protection, and they become trespassers by any act done to enforce them.—*Idem*.
8. C. & L. were duly summoned to answer to M. before a justice of the peace, at his residence. They appeared there on the return day; but neither the justice, who was absent from home, nor M. appeared; and no proceedings were had in the cause. Three days afterwards, L., in the presence of C., and of a witness, but in the absence of the justice, indorsed on a joint and several note of C. & L., found in the office of the justice, his individual confession of judgment thereon, upon which the justice, on the same day, without any continuance of the cause from the return day of the summons, or any declaration filed, rendered judgment

in favor of M., against C. & L., for the amount of the note. Execution was afterwards issued thereon, by virtue of which the property of C. was seized and sold. Whereupon, C. having brought trespass against the justice, it was held that, at the time when the judgment was rendered, the justice had no jurisdiction over the person of C., the summons having spent its force on the return day, and the parties being out of court, and the cause discontinued; and that he was liable to C. in the action.—*Idem.*

9. Where a court has jurisdiction, its proceedings cannot be impeached collaterally; nor, when of record, can there be any proof in opposition to the record.—*Idem.*
10. *Sembie*, that this rule applies to the proceedings of a justice of the peace, and to the docket of them which the statute requires of him to keep.—*Idem.*
11. But the rule does not apply to facts relating to jurisdiction; and the jurisdiction of special inferior tribunals, at least, over the person, as well as the subject matter, may be inquired into; and the want of jurisdiction may be shown by evidence, even when it tends to contradict the minutes or docket which those tribunals are required to keep as records of their proceedings.—*Idem.*

See CONSTITUTIONAL LAW, 2. MARITIME LAW, 2, 3. MICHIGAN STATE BANK, 10 to 12. OFFICERS, 2. PRACTICE, 4, 5, 16.

#### JUSTICE OF THE PEACE.

1. This court will overlook matters of form in proceedings before justices of the peace, and regard them according to the merits.—*Lamberton v. Foote*, 102.
2. Where an issue, formed upon a plea of not guilty to a declaration in replevin, was tried by a jury in a justice's court, who returned a verdict as follows: "This jury find for the plaintiff"—Held, that, although not a formal verdict in replevin, yet it is sufficiently indicated for which party the jury had found the issue, and that it was the duty of the justice to enter the verdict in the proper form, according to the substantial finding, and to render judgment thereon.—*Idem.*
3. The justice having refused to enter the verdict, and render judgment thereon, on the ground that it was insufficient, the court granted a mandamus to compel him to do so.—*Idem.*
4. The justice had no power to award a *ventre de novo* after the rendition of such verdict.—*Idem.*
5. A judgment by confession is void for want of conformity to the statute (R. S., 369, § 2), where it does not appear to be "signed by the person making the same, in the presence of the justice and one or more competent witnesses." The statute must be construed to require the witnesses to subscribe their names as such.—*Beach v. Botaford*, 199.
6. The docket entry of a justice's judgment must be as certain, in matters of substance, as the judgment of a court of record.—*Rood v. School District No. 7*, 502.
7. Under the proper entitling of a cause with the names of the parties, a justice of the peace entered on his docket an award of judgment in the following form: "It is therefore considered, that the said P. do recover of the said D. the sum," etc. In debt on this judgment, it was held, that the docket entry did not show with

sufficient certainty in whose favor, and against whom, the judgment was rendered, and that, therefore, a transcript thereof, offered in evidence, was inadmissible.—*Idem*.

8. Held, also, that parol evidence was inadmissible to prove that the letters "P." and "D." in the docket entry of the judgment, meant plaintiff and defendant.—*Idem*.

See APPEAL, 5. EVIDENCE, 9. JURISDICTION, 3 to 11. OFFICER, 3. PRACTICE, 1.

#### LACHES.

See CORPORATION, 3, 4. PRACTICE, 6, 17.

#### LANDLORD AND TENANT.

1. A tenant cannot dispute the title of his landlord, nor by his own act merely, change the tenure, so as to enable himself to hold against his landlord. He cannot, during the continuance of the lease or tenancy, make a valid attornment to a third person without his landlord's consent.—*Byrne v. Beeson*, 179.
2. A complained against B, under the statute of forcible entry and detainer, for holding over possession of certain premises, leased by B from A, contrary to the terms and conditions of the lease. Proof was offered in defense, that B was, at the time of the alleged leasing from A, in possession of the premises under a valid and subsisting lease from C. Held, that it was competent for either B, the defendant, or C, his landlord, to defend by showing these facts; and this, even though A claimed title to the premises under an act of the legislature granting the same to him.—*Idem*.
3. A contract by which a tenant is induced to desert his landlord, is corrupt and void; and the person to whom the tenant has attorned, cannot maintain an action upon it.—*Idem*.

#### LANDS AND LAND TITLES.

1. The land board constituted by the act of congress entitled "An act to provide for the adjustment of titles of land in the town of Detroit, and territory of Michigan, and for other purposes," approved April 21, 1806, did not consist of two integral parts, the governor and the judges of the territory of Michigan; but of four persons, designated by their names of office, any three of whom were authorized to execute any of the powers conferred by the act; and a deed of bargain and sale, executed by the judges only, is valid.—*Scott v. Detroit Young Men's Society's Lessee*, 119.
2. Congress having authorized the governor and judges of the territory of Michigan for the time being, to convey certain lands, the fee of which was in the United States, and having, by acts of legislation, recognized the persons who assumed to convey such lands, by virtue of such authority, as incumbents of those offices, and the existence of those offices, at, and subsequent to, the time when such conveyance was made, a mere stranger will not be permitted to controvert the title acquired by such conveyance, on the ground that the grantors were not, at the time of the grant, such governor and judges, and that there were no such offices.—*Idem*.

3. The reservation by the treaty between the United States and Chippewa Indians, made at Saginaw, September 24, 1819, of certain designated quantities of land, to be located as the president of the United States might direct, for the use of persons therein named, and their heirs, was a reservation of an estate in fee simple, to each of the individual reservees.—*Stockton v. Williams*, 56.
4. The treaty itself operated as a grant of land to each of the several reservees, which became perfect when the land was located under the direction of the president of the United States, and no patent was necessary to perfect the title.—*Idem*.
5. Held, that a patent issued by the president to a person claiming to be one of the reservees, was void, and could in no wise affect the title of the reservee under the treaty.—*Idem*.
6. Lands may be granted by act of congress, or by treaty, as well as by patent.—*Idem*.

See ADVERSE POSSESSION. CHANCERY. DEED. EVIDENCE, 1. PATENT FOR LAND TAX TITLES. TERRITORY OF MICHIGAN, 1. VENDOR AND PURCHASER, 1, 2.

#### LAW AND FACT.

See BANKS AND BANKING ASSOCIATIONS, 2. BILLS OF EXCHANGE AND PROMISSORY NOTES, 9. ERROR, 8. FRAUDULENT CONVEYANCES OF PERSONAL PROPERTY, 1.

#### LIEN.

See CARRIER, 1, 4. MICHIGAN STATE BANK, 2, 12. VENDOR AND PURCHASER, 1, 2.

#### LIMITATIONS, STATUTE OF.

1. A verbal promise made since, to pay a simple contract debt barred by the statute of limitations before the Revised Statutes of 1836 took effect, will not revive the cause of action, but such promise must be in writing as required by section 12, p. 578 of the Revised Statutes.—*Joy v. Thompson*, 375.
2. This construction of the statute does not give it the effect of violating the obligation of contracts.—*Idem*.

#### MAJORITY.

See LANDS AND LAND TITLES, 1. POWER, 1, 2.

#### MANDAMUS.

1. The writ of mandamus is issued only in cases where there is a clear legal right, and the party has no other remedy.—*People v. Judges of Branch Circuit Court*, 319.

See ATTACHMENT, 4. JUSTICE OF THE PEACE, 3. PRACTICE, 4, 7, 14, 19.

#### MARITIME LAW.

1. The steamer Missouri, being a new and seaworthy boat, and having on board passengers and a cargo of goods, on a voyage from Buffalo to Chicago, encountered a very severe gale on lake Huron. She was in great danger of perishing, from the violence of the wind and the roughness of the waves. After long struggling with

the tempest, the master and crew agreed that it was necessary to lighten her, in order to save her with her freight and passengers. Accordingly, a quantity of goods were, for that purpose, thrown overboard by the crew. The boat was saved though much injured, and returned to Detroit in safety, with the residue of her cargo. *Held*, that these facts would constitute a proper case under the maritime law, for general average. —*Rossiter v. Chester*, 154.

2. The maritime law is not in force over the lakes; or, in other words, they are not subject to admiralty jurisdiction, which is restricted to the open sea and to waters navigable therefrom as far as the tide ebbs and flows.—*Idem*.
3. The doctrine of general average is known only to the maritime law, and cannot be enforced in a court of common law jurisdiction.—*Idem*.

See FREIGHT, 1, 2.

#### MICHIGAN STATE BANK.

1. The Michigan State Bank, being indebted to the State of Michigan, conveyed to the state, in satisfaction of such indebtedness, certain real and personal property. In the agreement for the conveyance of the property between the bank and the commissioners empowered by the state to settle with the bank, it was declared that the assignment of the property was made upon, and subject to, the express condition, that the state should indemnify and save harmless the bank from and against certain claims and liabilities therein mentioned. *Held*, that this was a conveyance upon a condition subsequent, and that the property would revert to the bank on failure of the state to perform the condition.—*Michigan State Bank v. Hastings*, 235.
2. *Held*, also, that there could be no breach of the condition, until the bank was actually damaged; and that an allegation that the state had not paid a bond and mortgage of the bank, which was one of the liabilities mentioned in the condition, but had permitted the same to be foreclosed, and the mortgaged premises to be sold at a great sacrifice, much below their real value, and that it had refused to pay off and satisfy the balance still due on said bond, for which the bank had been threatened with a suit, did not show such damnification.—*Idem*.
3. *Held*, also, that, treating the condition as a covenant to indemnify, the bank would not, upon an allegation of these facts as a breach of the covenant, be entitled to an equitable lien upon the property for the payment of the liabilities mentioned in the covenant.—*Idem*.
4. *Held*, also, that a court of equity would not enforce a specific performance of the covenant before the bank had been actually damaged; nor even afterwards, as this could only be done in a proceeding directly against the state, which could not be made a party defendant to a suit.—*Idem*.
5. Quere, whether such condition could be treated as a covenant to indemnify.—*Idem*.
6. After the execution of the agreement between the bank and the commissioners on behalf of the state, the state took possession of the property thereby conveyed, and exercised acts of ownership and control over it, and, on the 17th day of February, 1842, the legislature of the state passed an act, constituting certain

state officers trustees on behalf of the state, to take charge of the property, empowering them to dispose of it, requiring that the proceeds should be paid into the state treasury, and used for the redemption of state scrip, and expressly sanctioning the agreement, except so much thereof as purported to bind the state to indemnify the bank, or to pay or advance money to discharge incumbrances, or for any other purpose, which portions were thereby expressly rejected. (S. L. 1842, page 110.) *Held*, that the statute had not the power to hold the property conveyed, and yet reject the condition upon which the conveyance was made; and that so much of the act of February 17, 1842, as purported to do so, was unconstitutional and void.—*Idem*.

7. *Held*, also, that the declaration, in the act of February 17, 1842, that the state rejected the condition, did not, in itself, constitute a breach of the condition.—*Idem*.
8. *Held*, also, that by acting upon the agreement between the bank and the commissioners, by exercising acts of ownership over the property conveyed, and also by the act of February 17, 1842, the state had recognized and affirmed the act of the commissioners in making the agreement, whether the commissioners originally had power to agree to the condition therein contained or not.—*Idem*.
9. The complainants being indebted to the state of Michigan, conveyed to the state in satisfaction of such indebtedness, certain real and personal property. In the agreement by which the property was conveyed, between the complainants and the commissioners empowered by the state to settle with them, it was declared that the assignment of the property was made upon, and subject to, the express condition, that the state should indemnify and save harmless the complainants, against certain claims and liabilities therein mentioned. By an act of the legislature, approved February 17, 1842 (S. L., 1842, p. 110), the defendants, the auditor-general, state treasurer, and secretary of state, of Michigan, for the time being, were constituted trustees, on behalf of the state, to take charge of the property assigned, and dispose of it, etc., and pay the proceeds into the state treasury; and, as such trustees, they entered into possession of it. Afterwards, the state neglected and refused to indemnify and save harmless the complainants against the liabilities mentioned in their agreement with the state, but suffered a judgment to be obtained against the complainants, on one of those liabilities, which the complainants were compelled to pay. Whereupon they filed in the Court of Chancery a bill against the defendants, setting forth these facts, for the purpose of obtaining relief, out of the property in their hands, against the failure of the state to indemnify, according to the terms of agreement. On appeal from the decree of the chancellor dismissing the bill,  
*Held*, that the conveyance by the complainants, to the state, was upon a condition subsequent;  
That the state had failed to perform the condition;  
That the property conveyed had thereupon reverted to the complainants, and the state ceased to have any legal interest in it;  
That the possession of the defendants was no longer the possession of the state; that they no longer had any power, under the act of February 17, 1841, to control or dispose of the property; and their further acts, in the exercise of such power, were their individual and personal acts, in derogation of the rights of the complainants.—*Michigan State Bank v. Hammond*, 587.
10. *Held*, therefore, that the Court of Chancery had jurisdiction in this case, and

- that it could not be objected to that jurisdiction, that the defendants were state officers, acting under state authority; or, that the state was virtually, or must be made, a party to the suit.
11. It was admitted that the court could not enforce a specific performance of the condition, or covenant to indemnify, contained in the agreement between the complainants and the state, as this could only be done by a proceeding directly against the state, which could not be sued in its own courts.—*Idem*.
  12. And, that an objection to the jurisdiction might, perhaps, be successfully urged, against a suit by the complainants against the state treasurer, to recover proceeds of the property conveyed, paid into the state treasury; as he holds money paid into the treasury, not as an individual, but as an officer, acting under authority of the constitution and laws of the state, which makes his possession the possession of the state.—*Idem*.
  13. Held, further, that, upon the facts set forth in the bill, and a waiver by the complainants of any forfeiture growing out of the breach of the condition upon which they conveyed the property to the state, a court of equity would adjudge the defendants trustees of the property for the benefit of the complainants; and would direct that the property, or its proceeds, in the hands of the defendants, or so much thereof as might be necessary for that purpose, be converted into money and be applied towards the payment of damages suffered by the complainants, in consequence of the failure of the state to indemnify them, according to the terms of the agreement between the complainants and the state.—*Idem*.
  14. But he who asks equity, must do equity; and it appearing by the answer in this case, that the complainants had possession of a considerable portion of the property conveyed, and refused to deliver it to the state, it was held, that such relief would not be granted to the complainants, until they delivered to the state the property so retained by them, and which constituted a part of the fund out of which they were to be indemnified.—*Idem*.
  15. Held, also, that the complainants would not be entitled to such relief, unless upon a waiver of the forfeiture growing out of the breach of the condition, on which the property was conveyed to the state.—*Idem*.

## MONEY.

See OFFICER, 3, 4.

## MONUMENTS.

See EVIDENCE, 1. DEED.

## MORTGAGE OF LANDS.

1. A subsequent mortgagee has a right, under the statute (R. S., 501, § 10), to redeem premises sold on foreclosure of a prior mortgage.—*Kimmell v. Willard's Administrators*, #17.
2. Where a mortgage is foreclosed by advertisement under the statute (R. S., 501, Ch. 8), for a default in the payment of one of several installments, and the mortgaged premises are bid off for the amount of such installment only, they are thereby forever disengaged from the mortgage.—*Idem*.

3. *Sensible*, that a mortgagee might protect himself against such consequence of a statute foreclosure for one of several installments, either by bidding off the premises for the whole sum secured by the mortgage, or, by having them exposed to sale, charged expressly with the payment of the future installments.—*Idem*.

**NON DAMNIFICATUS.**

See PLEADING, 7.

**NOTICE OF DISHONOR.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5, 6, 8.

**NOTICE UNDER GENERAL ISSUE.**

See PLEADING, 12, 14.

**OFFICER.**

1. Where a defendant, in an action of replevin, rests his claim to the property upon a seizure as constable, by virtue of an execution, he must, before proving the execution, show a valid judgment upon which it issued; and he will fail to establish any right to the property by virtue of the levy, if it appears that the judgment was void, or had been paid before the issuing of the execution.—*Beach v. Botsford*, 190.
2. The rule that a ministerial officer is protected in the execution of process issued by a court or officer having jurisdiction of the subject matter, and of the process if it be regular on its face, and does not disclose a want of jurisdiction, does not apply in such a case. It is a rule which merely protects the officer when proceeded against as a wrong-doer; it confers upon him no right to property, and, in replevin, the right to property, and not whether the defendant is a trespasser, is in issue.—*Idem*.
3. A justice of the peace is not authorized, in the absence of special instructions, to receive anything except gold and silver coin of the United States, in satisfaction of a judgment rendered before him; and, if he receive bank-bills, current as money at the time, from a constable who has collected the same on the execution, and enter satisfaction of the judgment, he will be liable to the judgment creditor for the amount, even though he afterwards tender him the bills received, and they become depreciated or worthless.—*Heald v. Bennett*, 513.
4. Neither has a sheriff or constable power to receive anything except the legal currency of the United States, on an execution in his hands for collection; and, if he does so, without special instructions, it is at his own risk.—*Idem*.

See JURISDICTION, 7, 8. POWER, 1.

**OFFICIAL CHARACTER.**

See EVIDENCE, 5.

**ONUS PROBANDI.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1. FRAUDULENT CONVEYANCES OF PERSONAL PROPERTY, 4.

## ORDINANCE OF 1787.

Article v. of the articles of compact contained in the "Ordinance of 1787, for the government of the territory of the United States, northwest of the river Ohio," secured, absolutely and inviolably, to the people of the territory of Michigan, as established by the act of congress of January 11, 1805, the right to form a permanent constitution and state government, whenever said territory should contain sixty thousand free inhabitants; and that right could in no way be modified or abridged, or its exercise controlled or restrained, by the general government.—*Scott v. Detroit Young Men's Society's Lessee*, 119.

See STATE OF MICHIGAN, 1, 4.

## PAROL EVIDENCE.

See EVIDENCE, 1, 5, 6. JUSTICE OF THE PEACE, 8.

## PARTIES.

See ATTACHMENT, 6. JURISDICTION, 1, 2. MICHIGAN STATE BANK, 4, 10, 11, 12.

## PARTNERSHIP.

1. The implied authority arising from the ordinary contract of copartnership does not authorize one of the partners, without the assent of his copartners, to make a general assignment of the partnership effects, to a trustee, for the benefit of creditors, giving preferences to some creditors over others. *Held*, therefore, that such an assignment made by one of the copartners, without the knowledge or assent of the other, who was present, attending to the business of the firm, and might have been consulted, was void.—*Kirby v. Ingersoll*, 477.
2. It seems, however, that the power in one partner to make such an assignment, may sometimes be implied from circumstances showing that it was intended to be conferred.—*Idem*.
3. Where one of two partners, without the knowledge or assent of the other, who was on the spot, and might have been consulted, assigned all the partnership effects to a trustee, for the benefit of the creditors, preferring some of them over others, and it appeared from the circumstances, that the assignment was made without any pressing necessity, and with a view to dissolve the copartnership, and to deprive the other partner of all the power in the management and disposition of the partnership property; *Held*, that it was a *fraud* upon the rights of the partner who did not join therein, and was, therefore, void.—*Idem*.
4. *Held*, further, that the fraud tainted the whole transaction; and that the assignment gave to the trustee no lien or security upon the partnership effects, for the payment of a debt due to him, which was preferred, by the assignment, over the claims of the other creditors.—*Idem*.
5. It is no objection to the appointment of a receiver to take charge of partnership effects, that one of the partners has assigned his interest therein to a third person.—*Idem*.

## PATENT FOR LAND.

A patent of land from the United States, cannot be impeached in an action at law, on the ground either of *fraud* or *mistake* in any of the proceedings required as prerequisites to its issuing, by one claiming under a subsequent grant.—*Bruckner's Lessee v. Lawrence*, 19.

See LANDS AND LAND TITLES, 4 to 6.

## PAYMENT.

1. Payment, by the defendant to the plaintiff, pending an action of *assumpsit*, of part of the entire demand to recover which the action is brought, is not equivalent, in its effect, as an admission of the cause of action, to a payment of money into court.—*Galloway v. Holmes*, 330.
2. The giving a promissory note or other security for goods sold, is no payment, unless it is specially agreed to be so taken.—*Gardner v. Gorham*, 607.

See ERROR, 3. OFFICER, 3, 4.

## PLEADING.

1. A count in slander, alleging that the defendant uttered and published that the plaintiff, who was postmaster at F., *embezzled certain papers*, is not supported by proof that he said *he had no doubt but that the papers were embezzled at F.*, or that *he thought the papers were embezzled at the post-office at F.*—*Taylor v. Kneeland*, 67.
2. A declaration in slander contained the usual inducement, without the averment of any extrinsic facts or circumstances showing the actionable quality of the words spoken, except that the plaintiff was postmaster at F., and the third count charged the defendant with having spoken and published, of and concerning the plaintiff, as postmaster, etc., that "*he did not think Marlatt's resignation or his petition had gone to Washington; he had no doubt they were embezzled at F.*" adding by innuendo ("at the post-office at F. of which the plaintiff was postmaster, meaning), meaning and intending thereby, that the plaintiff had delayed and prevented the transmission of said resignation and petition, to the postmaster-general at Washington," etc. Held, that the count was fatally defective, the words charged to have been spoken and published not appearing to be actionable.—*Idem*.
3. The words were not actionable *per se*, nor were they made so by the averment that the plaintiff was postmaster at F., since, if true, the charge they contained, would not subject the plaintiff to an indictment for a crime involving moral turpitude, or to an infamous punishment. They would, however, have become actionable had the inducement of the declaration further averred, that the letters or papers referred to, were placed in the post-office at F., or intrusted to the care of the defendant as postmaster at F., or were passed through the said post-office, to their place of destination, since the embezzlement, by the defendant, of papers which so came into his possession, is made criminal and punishable by fine or imprisonment by an act of congress.—*Idem*.

4. Extrinsic facts or circumstances showing the actionable quality of words not actionable *per se*, must be directly averred in the inducement of the declaration.—*Idem*.
5. The office of an *fanuendo* is merely to apply the different parts of the charge contained in the words, to the different facts before averred in the inducement. Its truth must always appear from precedent averments, and it must be supported by the inducement and colloquium.—*Idem*.
6. The omission of any averment, in a count in slander, that the defendant *maliciously* published the matter alleged, is cured by verdict, although it would be fatal on special demurrer.—*Idem*.
7. *Non damnisicatus* is not a proper plea to a declaration upon a covenant, executed on the dissolution of a copartnership between the plaintiff and one of the defendants, whereby the defendants covenanted to indemnify and save harmless the plaintiff from all liabilities created by the copartnership, from its commencement to its determination, *by assuming and paying the same in full when due*; the declaration averring that certain of those liabilities had become due, etc., and alleging a breach in the language of the covenant, and fully co-extensive with it.—*Wheelock v. Rice*, 267.
8. *Held*, that after issue joined upon the joint plea to the merits of R. and F., co-defendants, R. might plead severally, *puis darrein continuance*, his discharge in bankruptcy subsequently obtained.—*Idem*.
9. *Held*, also, that the plea *puis darrein continuance* was an abandonment by R. of the former joint plea of R. and F., which would afterwards stand as the several plea of F. to the same effect as if he had pleaded it sole.—*Idem*.
10. The complaint under the "act to provide for the collection of demands against boats and vessels" (S. L. 1839, p. 70), should contain every substantial averment, which would be necessary in a declaration at common law for the same cause of action; and it is governed by the rules which apply to declarations, in respect to joinder and misjoinder of counts.—*Owners of the Ship Milwaukee v. Hale*, 306.
11. A complaint under that statute contained four counts; two of which were, in substance, that the plaintiffs shipped on board the vessel, which was employed by the owners as common carriers, a certain quantity of wheat, and, in consideration that the plaintiffs promised to pay a certain price for the transportation, the owners of the vessel received the wheat on board, and agreed to proceed directly from the place of shipment to the port of destination, and deliver the same in good order, etc., but that they did not take care of, and securely convey and deliver the said wheat, but, on the contrary, the vessel was so carelessly managed, etc., that the wheat was lost and not delivered. The other two counts set forth a like shipment and undertaking to deliver, etc., pursuing the ordinary and accustomed route, without unnecessary deviation, etc., and alleged a deviation, during which the ship was assailed by a great storm and wrecked, etc., and the wheat was wet, damaged and spoiled and wholly lost, etc., and not delivered. *Held*, that all of these counts were in *assumpsit*, and properly joined.
12. Where it was assigned for error, that it appeared from the record, that, to the declaration or complaint, which was in *assumpsit*, the defendant had pleaded two pleas, *non assumpsit* and not guilty, and that it did not appear that the jury had

passed upon but one of the issues; *Held*, that either of the pleas was a full answer to the whole declaration, and, whether the declaration was in *assumpsit* or *case*, would be good after verdict; and that, as the plea of *non assumpsit* met the whole declaration, the plea of not guilty might be treated as a nullity, and stricken from the record.—*Idem*.

12. A notice of special matters to be given in evidence must contain all the substantial requisites necessary to constitute a special plea which would be good on general demurrer.—*Thompson v. Bowers*, 331.
14. To a declaration in slander, alleging that the defendant charged the plaintiff with having sworn falsely, the defendant pleaded the general issue, and gave notice that he would prove on trial "that the plaintiff was guilty of the facts charged upon and imputed to him by the defendant, in the several conversations in the declaration mentioned, and that, if the words were uttered and published as charged in the declaration, the defendant had good reason for uttering and publishing, and did it from good motives and for justifiable ends." *Held*, that this notice was fatally defective; especially in omitting any averment that the plaintiff *willfully and deliberately swore falsely*; and that the defendant could not, upon the trial, introduce any evidence under it.—*Idem*.

See AMENDMENT, 2. ATTACHMENT, 1. CORPORATION, 12. ERROR, 4. FOREIGN LAW, 2. INDICTMENT. JOINDER OF ACTIONS.

#### POWER.

1. Where several persons are empowered by law to execute a public trust or power, and, in the execution thereof, all are present to deliberate, the act of a majority will be valid.—*Scott v. Detroit Young Men's Society's Lessee*, 119.
2. They will all be presumed to have been present, and to have deliberated upon the act, unless the contrary expressly appears.—*Idem*.

See ORDINANCE OF 1787. STATE OF MICHIGAN, 1, 2, 4. TERRITORY OF MICHIGAN, 1 to 4.

#### POSSESSION.

See ADVERSE POSSESSION. FRAUDULENT CONVEYANCES OF PERSONAL PROPERTY, 1 to 3.

#### PRACTICE.

1. A writ of summons returnable before a justice's court will not be set aside on account of the omission of the plaintiff to comply with the statute (R. S., 405, § 5), requiring non-resident plaintiffs to give security for costs before process shall issue; provided the plaintiff gives such security *avec profunc*, before a motion to set aside the writ is granted.—*Parks v. Goodwin*, 58.
2. It has been the settled practice of the Circuit Courts to permit original writs to be indorsed *avec profunc* by security for costs, or by the plaintiff's attorney, where either of these indorsements (which, by the statute, R. S., 418, §§ 4, 8, are required to be made before service of the writ), have been omitted; and this, even after motion to set aside the writ, on the ground of such omission.—*Idem*.

3. A bill of exceptions, returned with a writ of error, appeared to have been signed after the writ was sued out. *Held*, that this was at most, whether at common law, or under the provisions of the statute (R. S., 388, § 16), a mere irregularity; which was waived by joinder in error.—*Brown v. Bissell*, 273.
4. A brought replevin against B, in a justice's court, and recovered a judgment, which was afterwards reversed by the Circuit Court on certiorari; and, at the next term after the reversal of the judgment, B moved that court for an order "that a jury be impaneled to assess the plaintiff's damages," which the court refused, ordering, "that the motion of the plaintiff in error, that a jury be impaneled and sworn to assess the value of the goods and chattels replevied, be denied." Whereupon, B moved this court for a *mandamus*, commanding the Circuit Court to impanel a jury to assess the value of the property. On such motion, it was held, that the Circuit Court had no such power as the *mandamus* would command them to exercise, the statute (R. S., 525, § 6) applying only to actions originally brought in that court.—*People v. Judges of Jackson Circuit Court*, 292.
5. But held, further, that, in such a case, the Circuit Court would have power under §§ 170 and 185 of the justices' act of 1841 (S. L. 1841, p. 81), to award a restitution of property.—*Idem*.
6. Held, also, that the motion for assessment was made too late, the parties being out of court, when the term at which the judgment was reversed had expired.—*Idem*.
7. Held, also, that the refusal of the Circuit Court to grant the motion for assessment of damages by a jury, was not a proper foundation for the application to this court, for a *mandamus*, commanding the Circuit Court to impanel a jury to assess the value of the property replevied.
8. Where it appeared from a record that the jury were duly "elected, tried and sworn," but not that they were "sworn well and truly to try the issue," etc. *Held*, that this was no ground of error, and that the record might be amended in this respect, after error brought, in affirmance of the judgment.—*Owners of the Ship Milwaukee v. Hale*, 306.
9. Where a record showed that *talesmen* were called and sworn upon the jury, but it did not appear that they had the requisite qualifications of jurors: *Held*, that this was no ground for error, but that it would be presumed after verdict (no challenge appearing to have been taken on that ground), that the jurors were qualified.—*Idem*.
10. By going to trial a party waives objection on the ground of the want of proper qualifications of the jurors.—*Idem*.
11. Also, objection to the sufficiency of the oath administered to the jury.—*Idem*.
12. Adjournments of the court from day to day, during the same term, are not continuances, which require to be stated in the record.—*Idem*.
13. Where it does not appear from the record that the jury retired to consult, they will be presumed to have found the verdict without leaving their seats.—*Idem*.
14. Where the defendant in a suit commenced in the Circuit Court by writ of attachment under the statute (R. S., 506), moved that court to quash the writ, etc., because the affidavit upon which it was founded was not made before an officer authorized to take affidavits, and the court thereupon permitted the plaintiff to

- file a new affidavit in the place of the one originally filed, and then refused to grant the defendant's motion, this court refused to grant a mandamus to compel the Circuit Court to quash the attachment, etc., but held that the proper remedy in such a case was by *certiorari*.—*People v. Judges of Branch Circuit Court*, 519.
45. The proceedings by attachment being under a special statute, and out of the course of the common law, the original affidavit, and the new one permitted to be filed, with the adjudication of the court directing it, would, in such a case, go upon the record, and be removed to this court by writ of *certiorari*.—*Idem*.
46. Where a writ of error brings before this court the record of the Circuit Court, in a case brought before that court by *certiorari* to a justice of the peace, this court has no power to require a further return of the justice to the *certiorari*.—*Wight v. Warner*, 534.
47. A motion to set aside a judgment for irregularity, made two years after it was rendered, the delay being unexplained, will be deemed too late.—*People ex rel. Hyde v. Judges Calhoun Circuit Court*, 477.
48. A motion to strike an amended declaration from the files, and the decision of the Circuit Court thereon, would constitute no part of a common law record of the case. Nor could exceptions be alleged to such decision under the statute (R. S., 282, § 16). It could not, therefore, be brought before this court for review by writ of error.—*People v. Judges of Washitawas Circuit Court*, 434.
49. Application to this court for a *mandamus* is the proper remedy of a party seeking to obtain a reversal of such decision.—*Idem*.

See AMENDMENT. APPEAL. ARBITRATION. ATTACHMENT. ATTORNEY. ERROR. EVIDENCE, 2, 8, 12. JURISDICTION, 8. JUSTICE OF THE PEACE. MANDAMUS. PLEADING, 6, 8, 9, 12. QUO WARRANTO. TIME, COMPUTATION OF. WARRANT OF ATTORNEY.

#### PRINCIPAL AND AGENT.

1. Where it distinctly appears in the body of a parol agreement, signed by an agent in his own name, without the addition of the name of his principal, that the principal is the contracting party, the agreement will be construed to be that of the principal, and not of the agent.—*City of Detroit v. Jackson*, 106.
2. It seems, that the rule, that an attorney or agent, to bind his principal, must sign the name of the principal, applies only to deeds, and not to simple contracts.—*Idem*.
3. If the principal recognize and affirm the existence and acts of an agent, a mere stranger will not be allowed to controvert either.—*Scott v. Detroit Young Men's Society's Lessee*, 119.

See ARBITRATION, 8. ATTACHMENT, 7 to 9. BANKS AND BANKING ASSOCIATIONS. CORPORATION, 1, 2. EVIDENCE, 2. LANDS AND LAND TITLES, 2. MICHIGAN STATE BANK, 8, 9. OFFICER, 3, 4.

#### PROTEST.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 7, 8, 11.

#### PUBLIC TRUST.

See POWER.

**PUIS DARREIN CONTINUANCE.**

See PLEADING, 8, 9.

**QUO WARRANTO.**

1. Where a person intrudes himself into an office in consequence of the unlawful decision of a board of canvassers, the remedy, by motion to this court for leave to file an information in the nature of a quo warranto to try the right to such office, is proper.—*People v. Nedale*, 69.

2. The court have a discretion as to the granting of such motions.—*Idem*.

See CORPORATION, 10. ELECTION, 8.

**RATIFICATION.**

See ARBITRATION, 8. MICHIGAN STATE BANK, 8.

**RECOGNITION.**

See LANDS AND LAND TITLES, 2. MICHIGAN STATE BANK, 8. PRINCIPAL AND AGENT, 3.

**RECORD.**

See JURISDICTION, 9 to 11. PRACTICE, 8, 9, 12, 13, 15, 16.

**REDEMPTION.**

See MORTGAGE OF LANDS, 1.

**REPEAL OF CHARTER.**

See CONSTITUTIONAL LAW, 8.

**REPLEVIN.**

A assigned goods to B, by way of security, which, being allowed to remain in A's possession after the assignment, were seized under an execution against him. Held, that B might bring replevin against the sheriff, for the goods, without previously demanding them.—*Jackson v. Dean*, 519.

See Carrier, 3. JUSTICE OF THE PEACE, 2. OFFICER, 1, 2. PRACTICE, 4, 5.

**RESERVATION.**

See LANDS AND LAND TITLES, 3 to 5.

**RETURN.**

See ATTACHMENT, 4, 5.

**SAFETY FUND ACT.**

See GENERAL BANKING LAW, 2.

**SALE OF CHATTELS.**

1. Evidence that the vendor of property represented to the purchaser, at the sale, that it was good, without knowing it to be so, and that it proved to be bad, will not establish fraud in the contract of sale. It must be further proved that the vendor knew such representation to be false when he made it.—*Horner v. Fellows*, 51.

2. Representations as to the quality of property, made by the vendor pending a negotiation for its sale, are merged in an express warranty of such quality, made by him on the consummation of the contract of sale which results from such negotiation; and, unless the purchaser can prove that such representations were known by the vendor to be false when he made them, and thus establish fraud, he must rely solely upon the warranty, for the remedy of any injury sustained in consequence of the falsehood of such representations.—*Idem.*
3. The agent of W. sold a fanning-mill to F., representing that it was good, and would do a good business, and took F.'s note for it, to which it was added, that the note was given for the mill which was warranted to be good and to do a good business, and that if it was not good, F. was to have the privilege of returning it within a certain time, and W. was to furnish a new mill in exchange, which should be good. In an action by W.'s administrators, on the note, *Held*, that unless it was shown that W. or his agent knew at the time of the sale that the mill was not good, F. was bound to return it according to the condition annexed to the note, before he could avail himself of any defect in the mill on his defense.—*Idem.*

See ASSUMPSIT. CONTRACT, 2. FOREIGN LAW, 1, 2. FRAUDULENT CONVEYANCES OF PERSONAL PROPERTY.

#### SATISFACTION.

See EVIDENCE, 9.

#### SCIRE FACIAS.

See CORPORATION, 10.

#### SECURITY FOR COSTS.

See PRACTICE, 1, 2.

#### SHERIFF.

See ATTACHMENT, 4. OFFICER, 5.

#### SLANDER.

See EVIDENCE, 4, 13 to 15. PLEADING, 1 to 6, 14.

#### SPECIFIC PERFORMANCE.

See MICHIGAN STATE BANK, 4, 11.

#### STATE OF MICHIGAN.

1. The territory of Michigan, as established by the act of congress January 11, 1805, did not remain subject to the territorial government until the admission of the state of Michigan into the Union by congress January 26, 1837; but the state came into existence, and possessed the power of independent state legislation, on the adoption and ratification by the people of the territory, of the constitution of the state, and the organization of the state government.—*Scott v. Detroit Young Men's Society's Lessee*, 119.
2. The "Act to incorporate the Detroit Young Men's Society," passed by the legislature, and approved by the governor of the state March 26, 1836, was not invalid.

on the ground that the state government had no legal existence until after the admission of Michigan into the Union, January 26, 1837.—*Idem.*

2. The formation of the constitution and government of the state of Michigan, must, of necessity, have preceded her admission into the Union by congress.—*Idem.*
4. The assent of congress to the admission of Michigan into the Union was only necessary, because the older states represented in congress possessed the physical power to refuse a compliance with the terms of compact contained in the ordinance of 1787, and there was no third party to which the state could resort to enforce such compliance; but the right to such admission, secured by article v. of the ordinance, became absolute and unqualified, on the adoption of the constitution of the state, and the organization of the state government.—*Idem.*

See ORDINANCE OF 1787.

#### SURVEY.

See DEED. EVIDENCE, I.

#### TAX TITLES.

1. A treasurer's deed executed October 10, 1838, in consummation of a sale of land for the taxes of 1838, is, at best, evidence of the regularity of the treasurer's sale only; and it is not admissible in evidence to prove title, unless accompanied by proof, that the taxes had been legally assessed and returned, and that all the proceedings anterior to the sale had been in conformity to the statute.—*Scott v. Detroit Young Men's Society's Lessee*, 119.
2. On the sale of land for the taxes of 1837, the relator became the purchaser and received the county treasurer's certificate of sale, which by the provisions of the statute under which the sale was made (Laws 1838, p. 96, § 15), would entitle him to a deed of the land within two years from the time of the sale, unless the same was sooner redeemed. Afterwards and before the time of redemption had expired, the same land was again sold for the taxes of 1838, and, having been bid off on the last sale, for an amount exceeding the amount of taxes, interest and charges due thereon, the surplus was, under the provisions of the statute (R. S., 98, § 16), deposited in the state treasury, to the credit of the owner or claimant of the land, and remained there until after the time for redemption under the sale for the taxes for 1837 had expired, and a deed of the land had been executed, by the county treasurer, to the relator, in consummation of that sale. The relator then claimed this surplus money. Held, that he was not entitled to receive it, he not being the owner of the land within the meaning of the statute.—*People v. Hammond*, 276.
3. Held, that the relator did not become the owner of the land, until the deed to him, from the county treasurer, was executed.—*Idem.*
4. Held, also, that the right to such surplus was personal, and did not follow with the title to the land; and that the person who was the owner, or who had the legal title to the land, when it was sold for the taxes of 1838, was entitled to receive it.—*Idem.*

## TERRITORY OF MICHIGAN.

1. Notwithstanding the previous organization of the state government, the governor and judges of the territory of Michigan, holding their offices and appointment under the authority of the United States, remained in office, and competent to execute the powers conferred upon them by the act of congress, entitled "An act to provide for the adjustment of titles of land in the town of Detroit, and territory of Michigan, and for other purposes," approved April 21, 1806, until after the first day of July, 1836.—*Scott v. Detroit Young Men's Society's Lessee*, 112.
2. They continued in office, and in the full and undiminished exercise of their powers as governor and judges, over the country lying west of lake Michigan, which formed a part of the territory of Michigan, at the time of the organization of our state government, until after the third day of July, 1836, when the territory of Wisconsin was organized.—*Idem*.
3. The jurisdiction and powers of the judges of the territory of Michigan as a District and Circuit Court of the United States, conferred by acts of congress of March 3, 1806 (Story's Laws U. S., 975), and February 19, 1831 (Gord. Dig., § 580), remained unaffected by the organization of the state government, and were retained by them, until their offices were abolished by express legislation of congress, to take effect on the admission of Michigan into the Union.—*Idem*.
4. The organization of our state government in its various departments, was gradual and progressive; and that no inconvenience might arise therefrom, it was provided by sec. 5, of the schedule annexed to the constitution of the state, that all officers, civil and military, then holding their offices and appointments in the territory, under the authority of the United States, or under the authority of the territory, should continue to hold and exercise their respective offices and appointments, until superseded under the constitution. As the Judges of the Supreme Court of the state did not enter upon their official duties, and the law under which they were appointed did not take effect until after July 4, 1836, it might be plausibly contended, that the judges of the territory remained in office, and that their offices were not superseded until that time.—*Idem*.

See ORDINANCE OF 1797. STATE OF MICHIGAN, 1.

## TIME, COMPUTATION OF.

Where a statute requires that process shall be served a certain number of days before the return day, both the day of service and the day of return must be excluded, in the computation of the time; the latter being excluded by the terms of the statute, and the former by the rule of construction provided by R. S. 3, § 3, subd. 11.—*Dowman v. O'Malley*, 450.

## TROVER.

See CARRIERS, 2.

## VENDOR AND PURCHASER.

1. Equity gives to the vendor of real estate a lien upon the land for the purchase

money unpaid in the absence of any agreement or security having the effect to surrender it.—*Palmer and others, Appellants, 429.*

2. But if the vendor take a distinct and independent security for the purchase money, other than the mere personal obligation of the vendee, as if he take a bond of the vendee with sureties, or his promissory note with indorsers, the lien is gone; this being considered evidence that he did not trust to the estate, as a pledge for his money.—*Idem.*

**ASSUMPTIT. CONTRACT, 3. SALE OF CHATTELS.**

**VENIRE DE NOVO.**

See **JUSTICE OF THE PEACE, 4.**

**VERDICT.**

See **JUSTICE OF THE PEACE, 2, 3.**

**WAIVER.**

See **EVIDENCE, 8. PRACTICE, 8, 10, 11.**

**WAREHOUSEMEN AND FORWARDERS.**

See **CARRIER, 1.**

**WARRANT OF ATTORNEY.**

1. A judgment will not be reversed, on error, because no warrant of attorney authorizing the prosecution of the suit appears in the record, even where the plaintiff below was a corporation.—*Farmers & Mechanics' Bank v. Troy City Bank, 457.*

2. The practice of giving or filing such warrants of attorney has never prevailed in this state.—*Idem.*

**WARRANTY.**

See **SALE OF CHATTELS, 2.**

**WITNESS.**

See **EVIDENCE, 6 to 8.**

**WRIT.**

See **PRACTICE, 2.**

**END OF VOLUME ONE.**







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